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Office Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 126

JAMES BUTLER ELKINS AND RAYMOND FREDERICK CLARK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 449–459) is reported at 266 F. 2d 588.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1959 (R. 460), and a petition for rehearing was denied on May 28, 1959 (R. 460–461). The petition for a writ of certiorari was filed on June 19, 1959, and granted on October 12, 1959 (R. 461, 361 U.S. 810). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the state search and the federal search were lawful.

2. Whether evidence obtained by state officers pursuant to a defective state warrant is admissible in a federal criminal trial, where no federal officer participated in, or had prior knowledge of, the illegal state search.

3. Whether a state court, by a temporary restraining order entered in a state civil suit, may enjoin the testimony of witnesses subpoenaed to appear and testify at a federal criminal trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 2 of Article III of the Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * [and] to Controversies to which the United States shall be a Party; * * *.

Clause 2 of Article VI of the Constitution provides:

> This Constitution and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution provides in pertinent part:

> * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

I

THE CONVICTION

A nine-count indictment filed on February 4, 1957, in the United States District Court for the District of Oregon charged petitioners with intercepting and divulging telephone communications, and conspiracy to do so, in violation of pertinent federal statutes (R. 4–11). A jury found petitioners guilty of all counts except counts 3 and 4. On May 21, 1957, petitioner Elkins was sentenced to a total of twenty months' imprisonment and a fine of $2,000. Petitioner Clark was sentenced, that same day, to total imprisonment for four months and sixty days and a fine of $500 (R. 31–34, 400). The court of appeals affirmed the convictions (R. 449–459).

II

THE FEDERAL MOTION TO SUPPRESS

The issues in this case relate solely to the seizure by state officers of tape recordings of telephone communications and related paraphernalia, and the manner in which the articles so seized came into federal hands. The facts shown by the record relating to these issues may be summarized as follows:

A. THE MOTION

On March 25, 1957, prior to their trial on the federal indictment, the petitioners moved for the return of seized property and its suppression as evidence, praying, *inter alia,* that the court order the return of "certain property of which defendants herein are the owners" (R. 13).[1] In this motion and the supporting affidavit executed by their counsel, petitioners alleged that on May 17, 1956, petitioner Clark's residence in Portland, Oregon, had been searched pursuant to a warrant issued by a state court and that five tape recordings, a recording machine, and three spools of recording machine wire had been seized (R. 13, 15-17); that on May 22, 1956, a Multnomah County grand jury had indicted the petitioners for the state offense of wiretapping (R. 17); that the District Court for Multnomah County, Oregon, had held on May 29, 1956, that the state search warrant had been improperly issued and had directed the items seized be "impounded in the possession of the sheriff of Multnomah County,

[1] This claim of ownership was expressly reaffirmed at the hearing on the motion (R. 182).

to be held at and released only upon the direction of the Attorney General of the State of Oregon or such higher circuit or Supreme Court before whom the matter may be heard"[2] (R. 24); that the Attorney General of Oregon had deposited the tape recordings and related items with the Oregon State Police for safekeeping and the police in turn had lodged them in a safe deposit box in a commercial bank in Milwaukie, Oregon (R. 18); and that on September 5, 1956, F.B.I. Agent Ronald E. Sherk executed at the bank a federal search warrant for these items, thus bringing them into federal custody (R. 13, 18).

The motion and supporting affidavit further alleged that during the week ending September 15, 1956, both petitioners had moved in the Oregon Circuit Court for Multnomah County for suppression of the tape recordings and other items as evidence in the state prosecution for wiretapping (R. 17–18, 25). On September 17, 1956, the circuit court had held that the search and seizure of May 17, 1956, were illegal, because they were based on a faulty state warrant (R. 26–27) and stated that the Attorney General of Oregon "must get an order of the Court before [he] can use [the items seized]" (R. 25–27). Refusing to suppress the evidence, the court ordered that the property be turned over to the Attorney General of Oregon "to be disposed of according to the law and by the order of this Court" (R. 26, 28).

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[2] This quotation and the others on this page, relating to the order of the Oregon Circuit Court on September 17, 1956, are taken from the opinions of those courts which accompanied petitioners' motion to suppress (R. 21–28) and which were made a part of the affidavit of petitioners' counsel (R. 17, 18).

B. THE EVIDENCE AT THE HEARING

1. At a four-day hearing (April 9–12, 1957) on the petitioners' motion to suppress in the federal criminal prosecution, it was shown that William Langley, the district attorney for Multnomah County, Oregon, had received reports that "in the bootlegging establishments and houses of prostitution controlled by Elkins and Clark there were peepholes in which there were placed moving-picture cameras and that these moving-picture cameras were used to take the pictures of the activities of various customers in these places" (R. 55). On May 17, 1956, Brad Williams, a local reporter, came to Langley with substantially the same information and offered to put Langley in touch with Williams' source of information. While Langley listened on an extension, Williams telephoned the chief of police of St. Helens, Oregon, who told the reporter and Langley that petitioner Clark "was in the business of leasing and renting these moving pictures * * * and that these moving pictures were in—were kept in Clark's house" (R. 55–56). Herder also told Williams that Clark, who had been the police chief of St. Helens, had been discharged for stealing gas (R. 73). On this basis, Langley executed an affidavit alleging that, "upon information and belief," petitioner Clark possessed, in violation of state law, "certain obscene and indecent photographs with accompanying sound recordings, with intent on the part of the said Raymond Clark to Exhibit said photographs" (R. 20; see R. 53). The affidavit expressly identified the source of Langley's information as "Chief of Police Herder of St. Helens, Oregon" (R. 21). The state district court

issued a state search warrant on the basis of the affidavit and the warrant was executed that evening (R. 240, 404–405, 411).

In the course of executing the warrant, Deputy Sheriff George Minielly found, in addition to obscene wire recordings and phonograph records (R. 86, 249), five reels of recording tape (R. 240, 244–246). Although Minielly did not—in fact, could not—play the tapes to determine what they contained, there were notes accompanying the recordings (R. 248, 253). While the notes did not state explicitly that the recordings were of telephone conversations, they gave "a synopsis of what was contained in each tape" (R. 248). On the basis of all the information which he had, including that contained in newspaper reports, Minielly concluded that the tapes were recordings of telephone conversations (R. 248). Other officers found and seized spools of recording wire, phonograph records, a movie projector, a recording device, head phones and amplifying units, slot machines, and movie film to fit the projector (R. 258–260, 407–409). The tape recordings were turned over to Terry Schrunk, the sheriff of Multnomah County (R. 87–88).

2. After listening to the tape recordings, it appeared to Schrunk that they might involve a federal violation. On May 19 (Saturday) or 21 (Monday) 1956, Schrunk informed the local office of the Federal Bureau of Investigation of the existence of the recordings (R. 92–93, 100).[3] He also notified the

[3] Since Friday, May 18, 1956, was primary election day in Oregon, Saturday, the 19th, was the first business day after the search (R. 93, 99–100).

Oregon Attorney General and the telephone company (R. 93, 100). One of the tape recordings was played for F.B.I. Agent Ronald Sherk on May 22, 1956, at the sheriff's office (R. 122, 125–126). From the nature of the recording itself, it appeared to be a recording of telephone conversations taken directly from telephone wires. In Sherk's opinion, "they were recorded directly off the wire," since "there was little, if any, background noise in part of the conversations whereas there was considerable background or room noise in other parts * * *" (R. 193; see generally R. 148–149, 191–195). Sherk felt that he "had every reason to believe" (R. 193) that the other four reels contained similar conversations, for there were notes in each box listing the date and time of recording and the names of the persons whose conversations were recorded (R. 143–144).

Although the local and federal law-enforcement authorities cooperated to the extent that local officers would pass along information regarding possible federal crimes uncovered during the course of local investigations (R. 100–102, 105–106, 262), the federal authorities had nothing to do with this state search and had no prior knowledge that it was to be undertaken (R. 69–70, 79, 100, 102–104, 125–126). Joseph Santoiana, the F.B.I. agent in charge of the Oregon district, testified that "prior to May 17th, and including May 17, 1956, I had nor did my office any knowledge whatsoever of the raid that was going to be pulled off. We had no prior indication, no prior consultation, no prior advice. We had no indication it was going to be pulled off. * * * [T]he first

time that we had notice was when we read it in the local press" (R. 275–276; see R. 125–126).

3. In the state court, the magistrate who had issued the warrant, a state district court judge, held a three-day hearing on petitioner Clark's motion for return of the seized property and its suppression as evidence, beginning on May 21, 1956. Chief of Police Herder of St. Helens, Oregon, was permitted to testify and denied giving any information to district attorney Langley (R. 22–23, 410).[4] The state court judge, however, did not permit the state to present any evidence or make any argument, so that neither Langley nor Williams testified at the state court hearing (R. 23–24, 60, 412). On May 22, 1956, before the state district court decided petitioners' motion, a state grand jury indicted petitioners for the state offense of wire tapping (R. 26, 68–70).

On May 29, 1956, the state district court held that, since Langley's affidavit stated that it was based primarily on information and belief, it was invalid on its face and therefore did not justify the issuance of the search warrant (R. 24). He directed the suppression of the fruits of the search as evidence, but did not order their destruction (except for twenty-six slot machines) or return. Instead, the state judge

[4] At the hearing in federal court on petitioners' motion to suppress, Herder admitted telling Williams, the newspaper reporter, that petitioner Clark possessed obscene pictures and records. He claimed, however, that his information came from two deputy sheriffs who had worked under petitioner Clark when Clark had been chief of police at St. Helens, and that in his telephone conversation with Williams he (Herder) had made it clear that his information was hearsay (R. 72–79).

ordered that the seized property be "impounded in the possession of the Sheriff of Multnomah County, to be held and released only upon the direction of the Attorney General of the State of Oregon or such higher circuit or Supreme Court before whom the matter may be heard" (R. 24; see R. 412–414).[5]

4. The federal search warrant was issued and executed by Agent Sherk on September 5, 1956 (R. 2–3, 187–188). Agent Sherk's affidavit, on the basis of which the federal warrant was issued, was also made on September 5, 1956. Sherk stated in his affidavit that he had personally listened "to portions of electronic tape recordings of conversations, which recordings contained intercepted telephone conversations" on May 22, 1956, and had personal knowledge of the location of the tapes (R. 1).

It was shown at the hearing in the federal district court that Agent Sherk also had other information at the time the affidavit was executed, apart from that learned by listening to one of the tapes and reading the accompanying notes. One of the recorded conversations purported to be a telephone conversation involving Langley. About May 28, 1956, Agent Sherk talked to Langley and learned that he had not given permission for the interception (see R. 1, 158–159). As to the location of the tapes, it was shown that on August 13, 1956, Sherk went to the bank in Milwaukie, Oregon, with Captain Gurdane and Lieutenant Cross of

[5] On April 26, 1956, the Governor of Oregon had ordered the state Attorney General to take charge of, and investigate conditions in, Multnomah County (R. 23, 26). Petitioners' case was presented to the state grand jury at the direction of the Attorney General (R. 68).

the Oregon state police. Sherk was permitted to view the five tapes, kept in a deposit box (R. 155–156, 174–178, 185).*

C. THE RULING ON THE MOTION

The United States Attorney took the position at the hearing on the federal motion to suppress that the legality or illegality of the state search under state law was immaterial, since there had been no federal participation in the search. He said: "we would not desire to redress the State processes and mark it as illegal in our view. It is a litigious question * * *. I think we can take the position, Your Honor, without saying that we either accept or disbelieve that it was or was not an illegal search and seizure, that for the purposes of this matter we may treat it as illegal" (R. 80). Nevertheless (as we have set forth above) defense counsel offered the testimony of a great many witnesses to show all of the facts relating to the state and federal warrants and the state and federal searches.

On April 12, 1957, at the close of the hearing on the motion to suppress, the trial judge ruled that the tape recordings and other items were admissible in the federal trial since "there is no evidence in this case which this Court can find that special agent Sherk * * * or any other agent of the United States had any knowledge or information or suspicion of any kind that this [state] search was being contemplated or was eventually made by the State officers

*Gurdane and Cross were the custodians designated by the Attorney General of Oregon (R. 235–237, 263, 265–268).

until they read about it in the newspaper" (R. 284). Since the evidence was thus admissible under the so-called "silver platter" doctrine, the judge declined to decide whether Agent Sherk made a legal search under a valid federal search warrant issued on an affidavit establishing probable cause (R. 278–279).

III

THE STATE INJUNCTION

On April 11, 1957, near the conclusion of the hearing on the federal motion to suppress, federal subpoenas were issued directing George Minielly, Terry Schrunk, Vayne Gurdane, and Claude Cross "to appear in the United States District Court for the District of Oregon * * * on the 16th day of April, 1957, at 11 o'clock A.M. to testify in" the present case (R. 415, 418–419). That same day, a federal subpoena was issued directing William Langley to appear and testify in this case on April 17, 1957 (R. 421). All of these subpoenas were "issued on application of the U.S." (R. 415, 419, 421).

On April 15, 1957, the day before the federal trial began, the Oregon Circuit Court for Multnomah County, in a civil suit filed by the petitioners, entered a temporary restraining order specifically enjoining George Minielly, Terry Schrunk, Oscar Howlett, Claude Cross, Vayne Gurdane, and William Langley (and other named persons who did not subsequently testify at the federal trial), as well as "all other State and County officers or officials having knowledge of this order", from giving testimony at the peti-

tioners' federal trial with respect to any matter "concerning the alleged illegal search and seizure of May 17, 1956, in the premises of the plaintiff Clark" and "the items allegedly illegally seized in said search" (R. 303, 424).[7]

The state court's order was presented to the federal trial judge at the opening of the petitioners' trial on April 16, 1957. He ruled that "the order just read so far as it attempts to interfere with the process of this Court here before issue [*sic*] is void and is a nullity and of no force and effect" (R. 309). In an oral opinion (R. 309–322), elaborating upon his reasons for this ruling, the trial judge stated that state and federal courts each must work in their separate spheres and that the state court had no right to attempt to control the federal proceeding by purporting to enjoin the testimony of federal witnesses, most of whom had been subpoenaed before issuance of the temporary restraining order (R. 415, 419, 421). While the trial court was of the opinion that there need not have been any conflict between the state and federal court in this case (R. 312), "when they come in irreconcilable conflict Federal judiciary must pre-

[7] The petitioners' suit in the state circuit court had been dismissed as to witness Howard R. Lonergan (a deputy district attorney for Multnomah County, who subsequently testified at petitioners' federal trial) on the petitioners' own motion (R. 302–303, 379). At trial, petitioners conceded that Lonergan was "technically correct" in saying that the state restraining order did not apply to him (R. 384–385). The witness James C. Darby (a member of the Oregon state police force, who also testified at the federal trial) was not named as a defendant in the state injunction suit (R. 301–302, 394).

vail under the [supremacy clause of the] basic constitution" (R. 322).[8]

The tape recordings and other paraphernalia which the petitioners had unsuccessfully sought to have suppressed were admitted in evidence at their trial (Govt. Ex. 1–5; R. 324–328, 331, 346–347, 353, 357, 359, 361). In accordance with the trial judge's ruling that the state court's injunction was invalid, eight officers and officials of the State of Oregon and Multnomah County who had been involved in the state search and seizure, or in the state legal proceedings following the search, or in the custodianship of the disputed evidence—and who had been specifically enjoined from testifying by the state court (George Minielly, Terry Schrunk, Oscar D. Howlett, Claude F. Cross, Vayne Gurdane, and William Langley) or who, petitioners claimed, otherwise came within the scope of that injunction (Howard R. Lonergan and James C. Darby)—were directed to and did testify (R. 365–367, 369–372, 374–377, 378–380, 388–389, 393–394, 394–396, 397).

IV

THE DECISION OF THE COURT OF APPEALS

The court of appeals, affirming petitioners' convictions, held that the lawfulness of the state search and

[8] During the course of the federal trial, petitioners sought a stay of proceedings in the Court of Appeals for the Ninth Circuit to enable them to petition for a writ of prohibition forbidding the federal trial judge from compelling the giving of testimony by the state officers named in the state court's restraining order (R. 286–294). The Ninth Circuit denied the application for a stay on the ground that a writ of prohibition could not be issued, since petitioners' remedy, if any, was by way of appeal (R. 304–306).

seizure of May 17, 1956, need not be considered, since the evidence clearly showed that no federal officer participated in it, and that the federal search and seizure of September 5, 1956, conformed to federal standards (R. 456–458).[9] The court therefore rejected petitioners' contention that the testimony of the state officials and the tape recordings themselves were inadmissible, although it noted that it need not have reached this question, since petitioners had failed to comply with the court's rules relating to the presentation of claimed trial errors (R. 458).

SUMMARY OF ARGUMENT

I

The federal district court and the court of appeals did not decide whether the state search was conducted under valid search warrants since they held that the legality of the state search was immaterial under the "silver platter" doctrine. The federal district court also did not consider it necessary to decide the validity of the federal warrant. The court of appeals, however, at petitioners' urging, held that the warrant was sufficient and that petitioners had no standing to raise the issue since the property was no longer theirs after it passed into the state's control. While the district court did not pass on the validity of the state search or the federal search, petitioners were permitted to,

[9] The court also pointed out that petitioners had no standing as to the issue of the lawfulness of the federal seizure, since the property seized was not in petitioners' custody or possession, actual or constructive, at the time, and they had no proprietary interest in the property (R. 457).

and did, show all the facts relating to these searches. The relevant facts are therefore before this Court.

A. The state search was valid under the Fourth and therefore, *a fortiori,* under the Fourteenth Amendments.

1. District Attorney Langley, after listening to a telephone conversation in which Herder, the chief of police at St. Helens, Oregon, described petitioner Clark's illegal activities, made an affidavit, on information and belief, alleging that Clark possessed property which Clark intended to use in violation of state law. It was inherently probable that Herder would be in a position to know of petitioner Clark's activities, since Clark had been the former chief of police at St. Helens, Oregon, and had been discharged for misconduct. And Herder's information was corroborated by information gleaned from other sources.

In federal practice—consistent with the Fourth Amendment—a search warrant is issued on the basis of probable cause. Probable cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient * * * to warrant a man of reasonable caution in the belief" that an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162. Langley's affidavit, which fully and fairly set forth the source and nature of his information, would have been adequate under these standards for the issuance of a federal search warrant under the Fourth Amendment. Certainly, then, it also satisfies the requirements of the Fourteenth Amendment.

2. Since the search warrant was valid, Deputy Sheriff Minielly entered petitioner Clark's residence as one properly entitled to do so. While engaged in a lawful search, he came upon electronic tapes and notes indicating that the tapes were recordings of telephone communications. As such, the tapes constituted property used to violate state law—and, with the recordings on them, fruits of crime as well.

This Court has held that a law-enforcement officer who has lawfully entered the premises may seize both "the instrumentalities and means by which a crime is committed" and "the fruits of crime." *Harris* v. *United States*, 331 U.S. 145, 154. And, although the search warrant did not specify tape recordings as the object of the search, the officers had the right to seize property related to other crimes which in good faith they happened to come upon. *Id.* at 153–155.

B. The state search and seizure were valid under Oregon state law.

1. An authoritative determination as to the validity of the state search under state law may be made in the proceeding which is being begun by District Attorney Langley to vacate the state injunction. As of this time, however, such a determination has never been made. Under Oregon law, if the seized property was used, or may be used, to commit a crime, the magistrate makes a return to the court of general jurisdiction—here, the circuit court—and holds the property subject to the higher court's order. The magistrate's order thus looks forward to another,

more definitive, proceeding. This was exactly the effect of the state district court order of May 29, 1956, which left the tape recordings subject to the order of the state Attorney General and the higher state courts. The determination of the state circuit court is likewise not final because, as an interlocutory order in state criminal case, it was not appealable by the state.

But even if the state circuit court's decision was final, it would not be binding on the federal court in determining whether the evidence was illegally obtained. *Res judicata* and collateral estoppel do not apply since the United States was not a party to the state court determination. And the circuit court's decision is not controlling as an interpretation of state law, since the federal courts in determining state law are not bound by courts of local jurisdiction—particularly when, as here, the determination of the local court appears to be in conflict with the decisions of the highest state tribunal.

2. Oregon, like federal, law provides that search warrants must be based upon probable cause. Probable cause has been defined, for Oregon purposes, as the existence of such circumstances as would lead a reasonably prudent man to believe in the guilt of the accused person. In *State* v. *Hoover,* 347 P. 2d 69, decided November 25, 1959, the Supreme Court of Oregon has indicated that information received from an identified reliable source constitutes sufficient probable cause under Oregon law for the issuance of a valid search warrant.

3. The state warrant, according to Oregon law, was directed toward the seizure of particular items which the warrant alleged had been used, or were intended to be used, to effect a state criminal offense. Just as under federal law, the rule in Oregon is that a police officer who comes upon the instrumentalities of a crime while executing a valid search warrant has both the right and duty to seize the offending property, even though it is not named in the warrant.

C. The property validly passed from state to federal custody.

1. Under state law the petitioners are not entitled to the return of property used to commit a crime even if the use of the property as evidence is suppressed. Petitioners therefore have no interest in the transfer of custody as between the state and federal government. In fact, the federal warrant was itself a valid basis for the admission of the evidence.

2. The federal warrant was, ~~in any event,~~ valid. Although the federal district judge did not rule on the validity of the federal warrant, he allowed petitioners to, and they did, make full inquiry into the basis and extent of the F.B.I. agent's knowledge in executing the affidavit for the federal warrant. The court of appeals thus acted on a full record when, at petitioners' invitation, it passed on the merits of the federal search and concluded that the federal warrant was entirely proper.

The record shows that F.B.I. Agent Sherk, when he made his affidavit, had probable cause to believe that the tapes had been used to intercept telephone

conversations, and that the purpose of the interception was to use the conversations in a way to violate federal law. Sherk had listened to one of the tapes which intrinsically evidenced that it was a recording of a telephone conversation made by interception, and had read the notes accompanying the other tapes. He had talked with one of the participants to a recorded telephone conversation and learned that the interception was not authorized. He knew precisely where the recordings were stored. And his affidavit sets forth the operative facts with clarity and in detail.

II

Even if the search and seizure by the state officers were illegal under the Fourteenth Amendment, the admission of the evidence seized was nevertheless proper under the "silver platter" doctrine. And if the seizure was illegal only under Oregon state law, the admissibility of the evidence is even more clear. Not only does the rationale of the silver-platter doctrine apply, but there is little reason for the federal courts to be enforcing especially restrictive state laws which interfere with federal law enforcement.

A. When the local state officials obtained and executed the state warrant, they were acting to redress a violation of state law. No federal officers took part in, or did anything to instigate the state action. The federal officers did not even have prior knowledge that the state search was going to take place. Thus, the evidence in this case was, in the terms of *Lustig* v.

United States, 338 U.S. 74, 79, "turned over to the federal authorities on a silver platter."

B. 1. In *Weeks* v. *United States,* 232 U.S. 383, this Court first enunciated a rule suppressing evidence obtained by an unreasonable search and seizure by federal officers. In the same case, the Court held that it was not error to permit the use in a federal trial of property improperly seized by state policemen, since they had not acted under any claim of federal authority. This decision has been followed by numerous decisions of this Court. To the extent these cases, and particularly *Weeks,* rested on the inapplicability of the Fourth Amendment to state action, their rationale is weakened by *Wolf* v. *Colorado,* 338 U.S. 25. But the numerous subsequent decisions of almost all the courts of appeals demonstrate that the actual holding of *Weeks* is still applicable, although the rationale of the rule has changed.

2. The rule of exclusion is itself a rule of practicality. It is a judicial sanction adopted by this Court as an effective way to enforce the right of privacy against incursion by federal officers. As such, it is essentially disciplinary in character, and is not a necessary requirement of the Fourth and Fourteenth Amendments.

3. The disciplinary character of the exclusionary rule accounts for, and justifies, the silver-platter doctrine. First, as this Court emphasized in *Wolf,* public opinion can much more readily exert itself against illegality on the part of local, than federal, officers. Therefore, a disciplinary rule to control

state officers is no more needed and constitutionally required in federal courts than in state courts.

Second, the only officers that federal courts can effectively control are federal officers. If an unlawful search or seizure was not participated in by federal officers, a rule of exclusion in the federal courts would not tend to preserve the right of privacy embodied in the Fourth and Fourteenth Amendments. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations by an exclusionary rule in the federal courts. On the other hand, an exclusionary rule would mean that state officers, whether inadvertently or deliberately, could interfere seriously with federal prosecutions. Thus, balancing the importance of protecting individual freedom with the needs of an ordered society, the silver-platter doctrine is still justified. The doctrine merely recognizes that exclusion is not a remedy sufficiently efficacious to deter all acts of official misbehavior, and that the federal prosecution ought not to be curtailed when the deterrent aspects of exclusion are so tenuous as to be wholly speculative.

4. Petitioners argue that a rule of admissibility in federal courts would promote subterfuge and evasion on the part of state and federal officers. If the rule is used as a means of evasion, that can best be dealt with as it occurs, rather than by adopting an inflexible rule of exclusion. There are no facts in this case to support any suggestion of evasion.

The argument that the federal courts somehow ratify illegality when they admit evidence illegally

obtained by state officers is not well founded. The rule of exclusion is applied, not because admission of the evidence implies approval or ratification, but because federal exclusion effectively serves to keep federal law enforcement within proper bounds. The most that the federal court can undertake to do is to make certain that its own officers—federal officers—conduct law enforcement activities within proper limits.

Also, the federal government ought not to discriminate between the minority of states which have the exclusionary rule and the states which do not, or which like Oregon are undecided, so long as the states are free to adopt their own methods of protecting the right of privacy. Since the states are not obliged to adopt a rule of exclusion by the Fourteenth Amendment, federal courts should not be required to go beyond ascertaining that the property is in state custody, particularly when the state is not obliged to return it. That would be more in keeping with this Court's traditional avoidance of intrusion in the administration of criminal law by the states in the absence of congressional command or state trenching upon the requirements of due process.

C. If, contrary to our contentions, the silver-platter doctrine is rejected, this Court could adopt a flexible standard. Such a standard would consider the nature of the illegality by which the evidence was obtained and distinguish between deliberate or serious infractions and those which are inadvertent and comparatively minor. A flexible standard could be deemed ap-

propriate since the silver-platter doctrine applies to a factual situation (state officers and a federal court) which stands between that involved in *Weeks* (federal officers and a federal court) and in *Wolf* (state officers and a state court).

Here, the state officers attempted to comply with federal and state law by obtaining a search warrant from a magistrate. And the illegality, if any, was certainly not clear or serious. Considering these circumstances and the fact that the exclusion of evidence would interfere with federal law enforcement without effectually disciplining state officers, the evidence here was properly admissible under any standard attempting to balance the rights of the individual and the valid interests of society as a whole.

III

The validity of the state court order restraining state and local officers from testifying in petitioners' federal trial is immaterial on review of petitioners' federal convictions. In any event, the injunction was invalid.

A. The validity of the state injunction is immaterial because it ran neither to the federal court nor the prosecution. The state and local officials who were bound by it, even if it were valid, testified at petitioners' trial. Whether or not the witnesses were in contempt of the state court cannot affect petitioners' federal convictions.

B. 1. When the state circuit court judge entered his temporary restraining order, he knew that the

federal trial was to begin the following day and that the federal case depended upon the testimony of state officials named in the restraining order. Petitioners objected to the testimony of eight government witnesses at trial on the ground that the restraining order barred their testimony. All had already been subpoenaed by the federal government before the restraining order was entered, or, both petitioners and the state court knew, were likely to be subpoenaed shortly. The conflict between state and federal courts in this case thus did not result from the course of variant proceedings in the two courts. Instead, the conflict was deliberately brought about by petitioners and the state court, through an attempt to interfere with federal process in a federal criminal case.

2. In *Ableman* v. *Booth*, 21 How. 506, this Court held that, although the state was sovereign within its territorial limits, that sovereignty was limited by the Federal Constitution. Therefore, the sphere of action appropriated to the United States is beyond the reach of state courts and state process. The supremacy of the federal government in its proper sphere of action means that its judicial processes must be equally paramount in authority in carrying out federal laws.

The right of federal courts and federal process to be free of interference by state courts and state officers has received continuing recognition to the present day. State legislatures and state governors cannot nullify federal court orders, even by indirect interference. State courts cannot refuse to give effect to a valid federal statute simply because it affects

their rules of court practice, even though the converse is not true. A state judge cannot legally thwart a federal subpoena calling for production of, or access to, state voting records. It is the federal court which has statutory power to stay state court proceedings to protect its own jurisdiction, not the reverse.

3. The doctrine of comity concerns itself with the forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise toward each other by avoiding interference with each other's process. *Ponzi* v. *Fessenden,* 258 U.S. 254, 260. Had this doctrine been allowed full play in this case, the state court would have refused to restrain state officers whose testimony was relevant to the federal prosecution, without ever reaching the question of its lack of power because of overriding federal sovereignty. It was the state court which interfered with federal process, not the reverse. Of course, the federal court could decline to insist upon its exclusive right to determine the issues of the federal case, but it is not bound to do so.

4. There is not one word in *Rea* v. *United States,* 350 U.S. 214, suggesting that its rule—that a federal injunction may issue to prevent a federal agent from delivering illegally seized contraband in the custody of a federal court to a state court, and to prevent the federal agent from testifying about the illegal search in a state court—is an avenue designed for two-way traffic. All of the decisions by this Court regarding the supremacy of federal judicial process refute that contention. It is the state court which is subject to federal limitations, not the reverse.

ARGUMENT

INTRODUCTION

The evidence, the admissibility of which is under attack, came into federal custody on September 5, 1956, pursuant to a federal warrant addressed to the bank which held the evidence in custody for the Attorney General of the State of Oregon. While petitioners' motion to suppress in the federal court did attack the federal warrant as based on an insufficient affidavit (R. 14), the main thrust of the motion, and of the hearing thereon, was that the evidence had illegally been obtained by state officials because the state search was based on an insufficient state warrant. All that the federal district court found it necessary to decide on the motion to suppress was that the federal government had obtained the property from the state without having in any way participated in the means by which the state obtained that property (R. 278–286). It did not undertake to decide one way or another whether the state warrant was valid under state or federal law. The district court also did not deem it necessary to decide whether the affidavit which supported the federal warrant was sufficient (R. 278–279). The court of appeals, however, at petitioners' urging, did pass on the latter question, finding that the affidavit supporting the federal warrant was sufficient and that petitioners had no standing to raise the question since the property was no longer theirs after it passed into the control of the state.

The courts below did not undertake to decide the validity of the state warrant and seizure because, under the so-called "silver platter" doctrine, they con-

sidered it immaterial to determine whether the property had come validly into state hands, so long as the federal government did not participate in the state search and seizure. While, we submit, the decision below can be supported on that basis alone, the whole delicate question of federal-state relationships that is involved in the "silver platter" doctrine need not be reached, if, as we contend, the state search and seizure were valid under state and federal law. Although the federal district court did not pass on the validity of the state search, petitioners were permitted to show all of the facts relating to it at the hearing on the federal motion to suppress, and they took full advantage of the opportunity. As to this aspect of the case, they called and examined Langley (the district attorney of Multnomah County, who made the affidavit on which the search was issued), Minielly (the deputy sheriff who led the searchers and actually found the tape recordings), Schrunk (the sheriff of Multnomah County to whom Minielly gave the recordings), Herder (the chief of police of St. Helens, Oregon, who supplied the information on which Langley's affidavit was based), Howlett (the deputy district attorney who represented the state at the magistrate's hearing in the state district court), Lonergan (a deputy district attorney), and Cross and Gurdane (the Oregon state policemen who deposited the tape recordings with the Milwaukie, Oregon, bank). In addition, exhibits showing the various state proceedings were introduced. Thus, the relevant facts are before this Court on this record. Hence, this conviction should not be set aside without

a determination of the validity of the manner by which the evidence was obtained.

While two lower Oregon state courts have considered the issue of the state search and seizure, and have decided it contrary to our position here, these decisions do not finally and authoritatively decide this question. A recent decision of the Oregon Supreme Court, *State* v. *Hoover*, 347 P. 2d 69, decided November 25, 1959, after the grant of certiorari in this case, offers strong support for our view that the state warrant and search at issue here are valid under Oregon law. We have been advised that, on the basis of that decision, District Attorney Langley has filed a motion to vacate the temporary restraining order and related orders entered by the circuit court for Multnomah County in the civil suit for injunction brought by petitioners. This motion may lead to a final order and eventually to a decision by the Oregon Supreme Court which would be authoritative for state purposes.

For these reasons, we discuss first, as does petitioner, the validity of the search and seizure by the state. We show that there has as yet been no authoritative decision on that issue, and that the state warrant and seizure are valid by federal and state standards. We also show that the property validly passed from state to federal custody.

If we are correct in this initial argument, the validity of the "silver platter" doctrine need not be reached. If it is reached, it is our position that this doctrine is a desirable one in our federal system and should be retained.

Finally, we discuss the effect of the state court restraining order. We believe that this order has no bearing one way or the other on the issues discussed above, and no bearing on the validity of petitioners' conviction. Moreover, we submit that the state court injunction was an improper interference with federal process in violation of the supremacy clause of the Constitution.

I

THE EVIDENCE WAS LAWFULLY OBTAINED

Since the "silver platter" doctrine made the legality of the state search and seizure immaterial on the issue of the introduction of the seized evidence in a federal court, the government, during petitioners' federal trial, neither claimed that the search and seizure was valid nor admitted its invalidity (see *supra*, p. 11). Similarly, the federal district court did not determine this issue (see *supra*, p. 27). Nevertheless, at petitioners' initiative, the relevant facts were fully developed in the present record on the federal motion to suppress (see *supra*, pp. 6–11) and are extensively argued by petitioners in their brief before this Court. The government, as respondent, may therefore properly support the judgment below on the ground that the evidence was lawfully obtained.

A. THE STATE SEARCH WARRANT AND STATE SEIZURE WERE VALID UNDER THE FEDERAL CONSTITUTION

1. *The warrant.*—District Attorney Langley, after listening to a telephone conversation between Reporter Williams and Herder, the chief of police of St. Helens, Oregon, made an affidavit on information and belief,

alleging that petitioner Clark possessed property which Clark intended to use in violation of state law. See Ore. Rev. Stat., section 167.150. Langley identified the source of his information as the chief of police, surely a source of information whom Langley could reasonably believe to be reliable. Moreover, Langley could reasonably believe that Herder would be in a position to know of Clark's activities, since Clark had been the former chief of police of St. Helens, and had been discharged for misconduct. And Herder's information was corroborated by similar information Langley gleaned from other sources (see *supra*, p. 6). While Herder testified at the state district court hearing and at the federal hearing on the motion to suppress that he had told Williams and Langley that his information was hearsay heard from deputy sheriffs who had served under Clark, this was contradicted by Langley at the federal hearing.[10] Moreover, even on Herder's version, information from deputy sheriffs who worked under a particular person would be information on which a prudent man could reasonably rely.

In federal practice—which is consistent with the Fourth Amendment—the commissioner is entitled to issue a warrant if probable cause exists. Rule 41(c), F.R. Crim. P. "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians,

[10] Langley was not permitted to testify at the state hearing (R. 23–24, 60).

act." *Brinegar* v. *United States,* 338 U.S. 160, 175, quoted in *Draper* v. *United States,* 358 U.S. 307, 313. Hence, probable cause exists where "the facts and circumstances within [an officer's] knowledge and of which [he has] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief" that an offense has been or is being committed. *Carroll* v. *United States,* 267 U.S. 132, 162, quoted in *Brinegar* v. *United States, supra,* 338 U.S. at 175–176, and *Draper* v. *United States, supra,* 358 U.S. at 313.

In *Draper* v. *United States, supra,* this Court held that hearsay information relating to a specific offense, communicated to a federal agent by a reliable informant, was sufficient to give the officer probable cause for an arrest without warrant. Here, the informant was just as reliable, and the information equally specific. Beyond that, Langley's information was set forth in an affidavit and a state search warrant was obtained. Thus, far from constituting himself the sole judge of the question of whether probable cause existed to make a search, Langley fully and fairly set forth the source and nature of his information in an affidavit and invoked proper state procedures in obtaining state process. The Langley affidavit would thus have been adequate to constitute probable cause for the issuance of a federal search warrant under the Fourth Amendment. Certainly, then, it also satisfied the requirements of the Fourteenth Amendment.

2. *The search and seizure.*—Since the state search warrant was valid, Deputy Sheriff Minielly entered petitioner Clark's residence as one properly entitled to

do so. He was not a trespasser upon Clark's premises, even though a measure of force was required to effect that entry. The search warrant empowered him to seize motion pictures and accompanying sound recordings. When he came upon the tape recordings, he did not know their nature and had no way of determining upon the spot the nature of their contents, since he did not know how to operate a tape recorder (R. 253). But Minielly also found notes inside the boxes containing the tapes. The notes, while not specifically descriptive of the tapes as recordings of intercepted telephone conversations, gave a synopsis of the contents of each tape, including the date and time of the interception, and the names of the participants in each conversation. When coupled with information which Minielly had obtained from newspaper sources, these notes gave Minielly cause to conclude that the recordings were recordings of telephone communications (see *supra*, p. 7). As such, the tapes constituted property used to violate state law—with the recordings on them, were fruits of crime as well (see Ore. Rev. Stat., section 165.540)—and were therefore subject to seizure.

This Court has frequently held that an officer who has lawfully entered the premises, may seize both the "instrumentality and means by which a crime is committed" and "the fruits of crime." *Harris* v. *United States*, 331 U.S. 145, 154; see, *e.g.*, *Marron* v. *United States*, 275 U.S. 192, 199; *Agnello* v. *United States*, 269 U.S. 20, 30. Thus, the Court has not limited the right of seizure to material which is contraband in itself. The check involved in *Zap* v.

United States, 328 U.S. 624, the checks in *Harris*,[11] and the books of account in *Marron* were on their face less clearly offending than these tapes, which, as marked, were fairly known to be the direct fruits of the crime of wiretapping. The seizure, as well as the search, was therefore lawful.[12]

While the search warrant did not specify tape recordings as the object of the search, the officers had the right to seize instrumentalities or fruits of another crime which they happened to discover. The evidence shows that the search was made in good faith for the property specified in the warrant, and was not a general exploration. In similar circumstances, where officers were lawfully on the premises incident to a valid arrest, this Court held that law-enforcement officers need not ignore material related to other crimes which they came upon. *Harris* v. *United States, supra,* 331 U.S. at 153–155; see also *Kelly* v. *United States,* 197 F. 2d 162, 164 (C.A. 5); *United States* v. *Braggs,* 189 F. 2d 367, 369 (C.A. 10). While these cases involved the seizure of property possession of which is itself a crime, *i.e.*, contraband, there is no reason to distinguish such property from the instru-

[11] These checks were the object of the search in *Harris*, but were not discovered. The Court stated that, if they had been found, they would have been subject to seizure. 331 U.S. at 154.

[12] No valid objection to the warrant arises from the fact that only obscene phonograph records, and no obscene motion pictures, were found during the search. *Harris* v. *United States, supra; Steele* v. *United States No. 1,* 267 U.S. 498, 504; *United States* v. *Fitzmaurice,* 45 F. 2d 133, 134–135 (C.A. 2). "The search must be judged by the situation as disclosed before it was made, not by what turns out to be the truth; just as the event cannot support the search, so it cannot invalidate it." *United States* v. *Fitzmaurice, supra.*

mentality of an offense. Both types of property are subject to seizure pursuant to a search warrant which specifies them as the object of the search. And both should be equally subject to seizure when the searching officers happen to come upon them during a good-faith search, even though the search is directed to a different offense.[11a]

B. THE STATE SEARCH WARRANT AND STATE SEIZURE WERE VALID UNDER OREGON LAW

The principles which govern the validity of the state search and seizure at issue in this case are substantially identical under Oregon law with those under the Fourth Amendment discussed above (pp. 31–35). We therefore submit that the state search

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[11a] We also suggest that, even if, contrary to our contentions above, the search and seizure were inconsistent with the Fourth Amendment (if they had been carried out by federal officers), nevertheless the Fourteenth Amendment may not embody the Fourth Amendment in its entirety. Thus, in *Palko* v. *Connecticut*, 302 U.S. 319, 325, Mr. Justice Cardozo stated that only those rights which are "of the very essence of a scheme of ordered liberty" and are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," are included within the Fourteenth Amendment. Whether a search or seizure which would violate the Fourth Amendment always constitutes a violation of the Fourteenth Amendment has not been decided by this Court. See *Wolf* v. *Colorado*, 338 U.S. 25, 27–28 ("The security of one's privacy against arbitrary intrusion by the police—which is at the *core* of the Fourteenth Amendment—is basic to a free society. It is therefore implicit in the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."); *Frank* v. *Maryland*, 359 U.S. 360, 365–366 ("While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogues in state constitutions, the application of the Fourth Amendment and the *extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment* are of course not restricted within these historic bounds" (emphasis added)).

and seizure were also valid under Oregon constitutional, statutory, and decisional law. But, even if contrary to our belief, the State of Oregon restricts the right of law-enforcement officers to search and seize more narrowly than is required by the Federal Constitution, we contend, nonetheless, that the state search and seizure involved here were valid under such standards.

1. *The decisions of the state district and circuit courts.*—Although the Oregon Supreme Court may ultimately decide the validity of the state search in the proceeding begun by District Attorney Langley to vacate the state injunction (see *supra*, p. 29), as of now there is no final, authoritative decision of this issue in the state courts.

Under Oregon law, district courts have limited jurisdiction over certain classes of misdemeanors. Ore. Rev. Stat., sections 3.150, 46.040, 51.040, 51.050, 164.430, 166.120, 166.130. Judges of these local courts are also magistrates, and, when sitting as such, are entitled to issue warrants of arrest and search warrants for property, including property which has been used, or which is intended to be used, to commit a crime. *Id.*, sections 46.050, 133.030, 133.110, 141.010, 141.040, 141.060. After the search warrant is executed, a return is made on the warrant to the magistrate, who may hold a hearing and take testimony if the person from whose possession the property was taken controverts the grounds for issuing the warrant. *Id.*, sections 141.100, 141.130, 141.160. If the property seized was used, or may be used, to commit a crime, the magistrate retains it subject to the order

of the court of general jurisdiction—in this case, the circuit court—and makes a magistrate's return of all the documents to that court. Ore. Const., Article VII (Orig.), section 9; Ore. Const., Article VII, section 2; Ore. Rev. Stat., sections 141.170, 141.190. The magistrate's order thus looks forward to another, more definitive proceeding. This was exactly the effect of the state district court order of May 29, 1956, which left the tape recordings subject to the order of the state Attorney General and the higher state courts (see *supra*, pp. 4–5, 9–10).

The state circuit court has likewise made no final determination. Without taking additional evidence, the circuit court issued an interlocutory order in connection with the state criminal case. It therefore was not appealable by the state. Ore. Rev. Stat., sections 138.020, 138.060; *State* v. *Minnick*, 33 Ore. 158, 54 Pac. 223; cf. *Carroll* v. *United States*, 354 U.S. 394.

Even, however, if the state circuit court's decision were final, it would not be binding on the federal court in determining whether the evidence was illegally obtained. *Rios* v. *United States*, 256 F. 2d 173, 175–176 (C.A. 9), certiorari granted on other grounds, No. 52, this Term. The principles of *res judicata* and collateral estoppel do not apply since the federal government was not a party to the state court determination. Restatement, *Judgments*, §§ 78d, 93. Nor is the circuit court's conclusion controlling as an interpretation of state law since the federal courts, in determining state law, are not bound by state courts of local, rather than state-wide, jurisdiction. *King* v. *Order of Travelers*, 333 U.S. 153, 158–162. The determination of

a local court, such as the county circuit court here, is certainly not conclusive evidence of state law, particularly when it is in conflict with the decisions of the highest state court (see *infra*, pp. 38–41).[13]

2. *The warrant.*—Article I, section 9, of the Oregon Constitution provides that no search warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized. Section 141.030 of the Oregon Revised Statutes substantially repeats the constitutional command. And probable cause, for Oregon purposes, was defined in *State* v. *Duffy*, 135 Ore. 290, 295 Pac. 953, 957, as "the existence of such circumstances which would lead a reasonably prudent man to believe in the guilt of the accused party. * * *"

Recently, in *State* v. *Hoover*, 347 P. 2d 69, 74–75, decided November 25, 1959, the Supreme Court of Oregon, although dealing with a search without a warrant, indicated that information received from an identified, reliable source constitutes sufficient probable cause under Oregon law for the issuance of a valid search warrant. In that case, a cruising police officer observed an automobile double-parked in front of a local tavern and signaled its occupants to proceed. As the automobile moved away, two men who had been talking to its occupants ran over to the police

[13] Moreover, the circuit court's determination was not based on all the evidence introduced in the federal district court. The state district court refused to allow the state to offer any evidence and the circuit court decided the issue without hearing any further testimony (*supra*, pp. 9, 37).

cruiser and told the officer that a person in the automobile had threatened them with a revolver. The policeman pursued the automobile, stopped it, ordered the defendant to get out, and conducted a brief search of the vehicle, during the course of which he found a revolver. The Oregon Supreme Court held that the search was incident to a valid arrest and that, even assuming that the search preceded the arrest, they were so closely related in time and circumstance as to be reasonable. *Id.* at 75–79. In determining the validity of the police officer's arrest, the court necessarily had to pass upon the question of whether information received from other persons may constitute sufficient probable cause to justify an arrest or search. As to that issue, the state court said (*id.* at 75):

> Certainly there is no constitutional barrier to a search based upon information alone. * * *
>
> * * * * * *
>
> Some cases hold that upon facts as strong or stronger than in our own case mere information supplied by a third party is not enough to justify an arrest without warrant. * * * But other cases, with which we agree, hold that under proper circumstances mere information may be enough. * * *[14]

[14] Thus, the court, in effect, overruled the statement in *State* v. *Quartier*, 114 Ore. 657, 664, 236 Pac. 746, 748, that "[a]n affidavit on information and belief is not sufficient * * *." And this holding in *Hoover* is directly contrary to the basis of the state district court's decision here—that the warrant was invalid because it was based primarily upon information and belief only (R. 24)—which was apparently accepted by the state circuit court (R. 25).

The reasoning of *State* v. *Hoover, supra,* supports the sufficiency of the affidavit in this case as a basis for the issuance of a search warrant. Surely, the source of District Attorney Langley's information—the chief of police of St. Helens, Oregon—could more reasonably be believed to be reliable than the informants in *State* v. *Hoover,* who apparently were not known to the officer who made the search. See 347 P. 2d at 72. Moreover, Police Chief Herder was in a particularly good position to know of petitioner Clark's activities. In addition, Langley's information was corroborated by similar information he had otherwise obtained (see *supra,* p. 6).

3. *The search and seizure.*—Under Oregon law, the officers were justified in using necessary force to effect their entry under a valid search warrant. Ore. Rev. Stat., section 141.110. This warrant (R. 2–3), consistent with Ore. Rev. Stat., section 141.010, was directed toward the seizure of particular items which the warrant alleged had been used, or were intended to be used to effect a state criminal offense. And, just as under federal law, the general rule in Oregon is that a police officer, who comes upon the instrumentality of a crime while executing a valid search warrant, has both the right and the duty to seize the offending property, even though it is not named in the warrant. *State* v. *Muetzel,* 121 Ore. 561, 564, 254 Pac. 1010, 1011. Thus, an officer who comes upon the instrumentality of another crime in the course of his official duties need not close his eyes to it. So long as he is engaged in a lawful activity

when he uncovers the offending property, he is entitled to seize it. Here, Deputy Sheriff Minielly lawfully entered petitioner Clark's residence for another purpose, and while searching in execution of that lawful purpose came upon property which was both used to commit a state crime and was the fruit of that crime. That property, the tape recordings and related items, was subject to immediate seizure.

C. THE PROPERTY VALIDLY PASSED FROM STATE TO FEDERAL CUSTODY

1. Whether the property came into the hands of the state validly or invalidly, petitioners have no right to the return of it since the tape recordings were both the instrumentalities and direct fruits of a crime and would not be returned to petitioners, even if suppressed as evidence. As noted above (pp. 36-37), Oregon law provides for the retention of property used or intended to be used to commit a crime. Thus, both state courts, the district court and the circuit court, even though they found the seizure invalid, nevertheless placed the property in the custody of the Attorney General rather than return it to petitioners. Since the state had lawful custody of the property, the transfer of custody as between state and federal governments, and the means whereby the transfer was effected, were of no concern to petitioners any more than the transfer between state and federal governments of custody of a prisoner (who obviously has an interest in his own person) is a matter of which a prisoner can complain. *Ponzi* v. *Fessenden,* 258 254.

The property came into federal possession under a search warrant duly issued by a federal judicial officer upon an affidavit executed by FBI Agent Sherk upon the basis of his personal knowledge. Since, as we have shown, the property was, in effect, contraband and was in the lawful custody of the state, and since there was no illegality in the manner whereby Agent Sherk obtained the knowledge set forth in his affidavit, the allegedly tainted means by which the state officers obtained the property should not preclude the use of Agent Sherk's knowledge as a basis for the federal warrant. We show below that the personal knowledge set forth in his affidavit was sufficient probable cause for issuance of the warrant. (See *infra*, pp. 44–45). Hence, as the court of appeals held, the federal warrant was itself a valid basis for the admission of the evidence.

2. Petitioners argue (Pet. Br. 91–96) that the trial court did not permit them, at the hearing on their motion to suppress, to make full inquiry into the basis and extent of Agent Sherk's knowledge in executing the affidavit for the federal warrant, ruling instead that this issue was immaterial because the evidence was admissible under the "silver platter" doctrine. In these circumstances, petitioners claim, it was error for the court of appeals to sustain the conviction on the independent ground that the search and seizure under the federal warrant were valid.

In claiming that their inquiry was in fact curtailed, petitioners rely upon the federal trial court's statement, during the course of the federal hearing on the motion to suppress, that "This Court doesn't care

from here on out whether he [Agent Sherk] ever executed an affidavit for a search warrant" (R. 201; Pet. Br. 15, 94). Petitioners, however, do considerably less than full justice to the federal trial judge, for their quotation was not the end of this colloquy. Instead, the following exchange later took place between defense counsel and the court (R. 201):

> Mr. CRAWFORD. Then, I take it it would be useless for me to establish any further evidence with that objection [that the federal warrant was invalid] in view?
>
> The COURT. You may make your record.
>
> Mr. CRAWFORD. May I make my record?
>
> The COURT. To protect your theory about it.

Thereafter, defense counsel completed his examination of Sherk, continuing to probe into the circumstances surrounding the issuance of the federal search warrant among other matters (R. 202–205). When all of the facts are considered—including the fact that defense counsel had questioned Sherk at considerable length about his personal knowledge regarding the tape recordings before the remark now relied upon by petitioners was made (R. 120–134, 142–159, 174–195)—it is apparent that the trial judge meant, and defense counsel understood him to mean, that defense counsel was entitled to inquire fully as to the sources of Sherk's knowledge. The court was only making clear that it did not intend to rule, one way or another, on the validity of the federal search.

Since the facts were fully developed, petitioners' argument that the court of appeals ought not to have passed on the validity of the federal search is with-

out merit. Moreover, having pressed the issue as to the validity of the warrant in the court of appeals (R. 457–458), the petitioners are in a poor position to put that court into error for considering it. Petitioners' present argument (Pet. Br. 95)—which reduces itself to the proposition that the court below should have passed on the merits of the federal search only if it concluded that the search was invalid—is not persuasive. In any event, if the issue is important (as we do not believe it is), the facts on which to determine the validity of the federal warrant were before the court of appeals and are now before this Court.

3. The record shows that the federal warrant was entirely proper. The affidavit upon which the federal warrant was based was drawn so as to show affirmatively that the affiant, Agent Sherk, executed the affidavit on the basis of personal knowledge, and it set forth the operative facts with clarity and in detail. Cf. *Giordenello* v. *United States*, 357 U.S. 480, 486. At the time when Agent Sherk made the affidavit, he had listened to a tape recording seized as one of a group of five. That recording intrinsically showed that it was a recording of a conversation made by breaking into the telephone line itself. Sherk had examined the notes found in the boxes containing the other four tapes, and those notes listed the time and date of recording and the names of the persons whose conversations were recorded. He had also talked with one of the participants to a recorded telephone conversation and learned that the interception had not been authorized. On August 13, 1956, Sherk had been

permitted to view the tapes, so he knew precisely where they were to be found (see *supra*, pp. 8, 10–11). Surely, then, when Sherk made his affidavit, he had probable cause to believe, on the basis of personal knowledge, that the electronic tapes had been used to intercept telephone conversations, and that the purpose of those interceptions was to use the conversations in such a way as to involve violations of federal law.

Petitioners suggest (Pet. Br. 93) that Sherk's affidavit was invalid because his knowledge was stale, since he did not make the affidavit until some three weeks after last viewing the tapes. There is no flat requirement that the affidavit must be made and the search warrant obtained within a certain time after personal knowledge is acquired. Lower federal courts have upheld as valid affidavits based on facts obtained as much as nineteen to twenty-one days before the affidavit or search had been made. *Nuckols* v. *United States*, 99 F. 2d 353, 355 (C.A. D.C.), certiorari denied *sub nom. Floratos* v. *United States*, 305 U.S. 626; *United States* v. *Fitzmaurice*, 45 F. 2d 133, 134 (C.A. 2); *Hefferman* v. *United States*, 50 F. 2d 554, 556 (C.A. 3). Moreover, the facts are stronger here, since the cases cited involved situations—liquor and beer held for sale, and gambling violations—which could easily change during an extended period. In this case, the tape recordings were in a safe deposit box in the custody of state authorities, were not held for sale, and were property of a kind unlikely to deteriorate.

II

EVIDENCE OBTAINED BY STATE OFFICERS PURSUANT TO A DEFECTIVE STATE WARRANT IS ADMISSIBLE IN A FEDERAL CRIMINAL TRIAL, WHERE NO FEDERAL OFFICER PARTICIPATED IN, OR HAD PRIOR KNOWLEDGE OF, THE ILLEGAL STATE SEARCH [15]

If this Court finds, contrary to our contentions above (pp. 31–35), that the state search warrant was defective under the Fourteenth Amendment, we submit that the evidence seized was nevertheless properly admitted at petitioners' trial because it was obtained by state officers enforcing state law without participation by, or without even the prior knowledge of, federal officers. In other words, we urge the continued applicability of the so-called "silver platter" doctrine. If, on the other hand, the Court concludes that the state search was consistent with the Fourteenth Amendment, but illegal under Oregon law (on the ground that, contrary to our contention, Oregon law more narrowly restricts searches and seizures by law-enforcement officers than does the Federal Constitution), we believe that the admissibility of this evidence at petitioners' trial is even more clear. Not only does the rationale underlying the silver-platter doctrine apply (see *infra*, pp. 49–67), but there is little reason for the federal courts to be enforcing especially restrictive state law. The exclusion of probative evidence in this situation would be subordinating the important federal policy in punishing law

[15] Our argument as to the "silver platter" doctrine runs not only to this case, but also to *Rios* v. *United States*, No. 52, this Term—set for argument immediately following this case.

offenders in the federal government's own courts to the special policy of a particular state. Moreover, exclusion would require the federal courts to decide intricate and often novel questions of state law in an area—law enforcement by state officers—of particular sensitivity in the federal system.

A. THE STATE SEARCH AND SEIZURE WERE MADE BY LOCAL POLICE ACTING IN A LOCAL MATTER, WITHOUT AGREEMENT WITH, OR PARTICIPATION BY, FEDERAL OFFICERS

When District Attorney Langley executed his affidavit and obtained a search warrant, he was acting to redress a violation of state law. It is a crime under Oregon law to possess obscene photographs and sound recordings with intent to exhibit them (Ore. Rev. Stat., section 167.150), and Langley believed that petitioner Clark was committing, or intended to commit, this local offense. And when Deputy Sheriff Minielly made the search, he was looking for the items named in the search warrant, not for evidence of a federal crime.

As petitioners admit (R. 13–14),[16] no federal officers took part in the search and seizure, nor did they have any prior knowledge that the search was going to take place. The fact that the search took place first came to their attention when they read about it in a public newspaper. Although there was a common understanding on the part of Sheriff Schrunk's office that evidence of violations of federal law would be turned over to the appropriate federal authorities

[16] It is for this reason that petitioners ask the Court to overrule the silver-platter doctrine in its entirety (Pet. Br. 46–47).

when uncovered by state officers in the course of their investigations, the sheriff's office operated completely independently of the federal agencies. And there was no prior understanding that evidence procured in the course of this particular search would be made available to the federal government. No federal law-enforcement agency came into the picture until several days after the search, when Schrunk notified the local F.B.I. office, as well as other interested parties (see *supra*, pp. 6–8).

Where there is a showing of collusion or actual participation in their official capacities between federal and local authorities (*Lustig* v. *United States*, 338 U.S. 74, 78–79; *Irvine* v. *California*, 347 U.S. 128, 136; *Byars* v. *United States*, 273 U.S. 28, 33; *Burdeau* v. *McDowell*, 256 U.S. 465; *Fowler* v. *United States*, 62 F. 2d 656 (C.A. 7)), or where state officers act solely to enforce federal law (*Gambino* v. *United States*, 275 U.S. 310, 313, 316–317; *United States* v. *Butler*, 156 F. 2d 897 (C.A. 10)), the action of the local officers must conform to Fourth Amendment standards if evidence obtained by them is to be admissible in federal courts. Here, however, there is not only no showing of such participation, but not even any showing of knowledge of the seizure by federal officers until long after it had occurred. See *Graham* v. *United States*, 257 F. 2d 724, 727–728 (C.A. 6); *Anderson* v. *United States*, 237 F. 2d 118, 123–124 (C.A. 9); *United States* v. *Moses*, 234 F. 2d 124, 125–127 (C.A. 7); *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 921; *Fredericks* v. *United States*, 208 F. 2d 712, 714 (C.A. 5), certiorari denied, 347 U.S.

1019; *United States* v. *Pugliese*, 153 F. 2d 497, 499 (C.A. 2). The evidence in this case was, in the words of *Lustig* v. *United States, supra*, 338 U.S. at 79, "turned over to the federal authorities on a silver platter."

B. EVIDENCE OBTAINED BY LOCAL OFFICERS ENFORCING LOCAL LAW WITHOUT FEDERAL PARTICIPATION IS ADMISSIBLE IN A FEDERAL COURT EVEN IF ILLEGALLY OBTAINED

1. *The judicial precedents.*—In *Weeks* v. *United States*, 232 U.S. 383, this Court enunciated, for the first time, a rule suppressing evidence obtained by an unreasonable search and seizure by federal officers. But in that same case the Court held that it was not error to permit the use in a federal trial of papers and property improperly seized by state policemen for "it does not appear that they acted under any claim of Federal authority * * *." *Id.* at 398. A few years later in *Center* v. *United States*, 267 U.S. 575, the Court again held, in a *per curiam* opinion, that evidence seized wrongfully by state officers is nonetheless admissible in a federal court.[17] In *Byars* v. *United States*, 273 U.S. 28, 33, Mr. Justice Sutherland, for a unanimous Court, said:

> We do not question the right of the federal government to avail itself of evidence improperly seized by state officers operating entirely upon their own account.

And in *Feldman* v. *United States*, 322 U.S. 487, 492, Mr. Justice Frankfurter, speaking for the majority, stated that "incriminating documents * * * secured

[17] The opinion relied on *Burdeau* v. *McDowell*, 256 U.S. 465, which upheld the admissibility, in a federal court, of evidence wrongfully acquired by a private person.

by state officials [in an illegal search and seizure] without participation by federal officials but turned over for their use are admissible in a federal prosecution." [18]

To the extent that these cases, and particularly *Weeks,* suggest that the limitations of the Fourth Amendment apply only to federal action, their rationale is weakened by the holding in *Wolf* v. *Colorado,* 338 U.S. 25, that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable search and seizures by state officers. The actual holding of the *Weeks* and subsequent cases, however—that evidence obtained by state officers acting on their own is admissible in federal courts even if the state officers acted improperly—was not affected by the *Wolf* decision. This is shown by the fact that, at the same time it decided *Wolf,* this Court decided *Lustig* v. *United States,* 338 U.S. 74, where it held inadmissible certain evidence obtained by state officers because it found that there was federal participation in the search. The whole discussion of federal participation was irrelevant, if it followed necessarily from *Wolf* that the illegal action by the state officers *ipso facto* rendered the evidence inadmissible. Therefore, since *Lustig,* as well as before, the silver-platter

[18] The issue actually before the Court was whether incriminatory testimony elicited from a witness in a state proceeding under a state immunity statute could be used against him in a subsequent federal trial without violating the Fifth Amendment. The statement quoted above, however, was necessary to the decision, since the Court reasoned by analogy from the Fourth to the Fifth Amendments. 322 U.S. at 490–492.

doctrine has been accepted as controlling in numerous decisions by the courts of appeals of seven circuits.[19]

Although it was suggested in *Benanti* v. *United States*, 355 U.S. 96, 102, fn. 10, that this Court's adherence to the silver-platter doctrine is an open question, the holding in that case does not bear on that rule. In *Benanti*, state officers obtained "leads"

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[19] *United States* v. *Benanti*, 244 F. 2d 389, 392–393 (C.A. 2), reversed on other grounds, 355 U.S. 96; *Manning* v. *United States*, C.A. 5, decided January 21, 1960; *Kendall* v. *United States*, 272 F. 2d 163, 165–166 (C.A. 5); *West* v. *United States*, 259 F. 2d 868 (C.A. 5); *Grimes* v. *United States*, 234 F. 2d 571 (C.A. 5); *Shurman* v. *United States*, 219 F. 2d 282 (C.A. 5), certiorari denied, 349 U.S. 924; *Burford* v. *United States*, 214 F. 2d 124 (C.A. 5); *Fredericks* v. *United States*, 208 F. 2d 712 (C.A. 5), certiorari denied, 347 U.S. 1019; *Serio* v. *United States*, 203 F. 2d 576 (C.A. 5), certiorari denied, 346 U.S. 887; *Scotti* v. *United States*, 193 F. 2d 644 (C.A. 5), affirming 102 F. Supp. 947 (S.D. Tex.); *Graham* v. *United States*, 257 F. 2d 724 (C.A. 6); *Brown* v. *United States*, 255 F. 2d 400 (C.A. 6); *Ford* v. *United States*, 234 F. 2d 835 (C.A. 6), certiorari denied, 352 U.S. 972; *Collins* v. *United States*, 230 F. 2d 424 (C.A. 6); *United States* v. *Camara*, 271 F. 2d 787, 789 (C.A. 7), now pending on petition for a writ of certiorari, No. 605 Misc., this Term; *Frierson* v. *United States*, 223 F. 2d 255 (C.A. 6), certiorari denied, 350 U.S. 970; *United States* v. *Moses*, 234 F. 2d 124 (C.A. 7); *United States* v. *White*, 228 F. 2d 832 (C.A. 7); *United States* v. *Stirsman*, 212 F. 2d 900 (C.A. 7); *United States* v. *Haywood*, 208 F. 2d 156 (C.A. 7); *Costello* v. *United States*, 255 F. 2d 389 (C.A. 8), certiorari denied *sub nom. Cannella* v. *United States*, 358 U.S. 830; *Jones* v. *United States*, 217 F. 2d 381 (C.A. 8); *Loxiena* v. *United States*, 177 F. 2d 919 (C.A. 8); *Anderson* v. *United States*, 237 F. 2d 118 (C.A. 9); *Williams* v. *United States*, 215 F. 2d 695 (C.A. 9); *Jaroshuk* v. *United States*, 201 F. 2d 52 (C.A. 9); *Parker* v. *United States*, 183 F. 2d 268 (C.A. 9); *Symons* v. *United States*, 178 F. 2d 615 (C.A. 9), certiorari denied, 339 U.S. 985; *Euziere* v. *United States*, 266 F. 2d 88 (C.A. 10); *Gaitan* v. *United States*, 252 F. 2d 256, 258–259 (C.A. 10), certiorari denied, 356 U.S. 937; *Gallegos* v. *United States*, 237 F. 2d 694 (C.A. 10); *contra*, *Hanna* v. *United States*, 260 F. 2d 723 (C.A. D.C.).

by wiretapping, made an arrest and seizure, and turned the fruits of the seizure over to federal authorities, all without participation by federal officers. State police officers who testified at the federal trial admitted that they had obtained their "leads" by wiretapping, and the words of an intercepted message were disclosed to the trial judge and defense counsel. The Court held that this situation was not analogous to a case where an illegal search and seizure is made by state officers and that the federal anti-wiretapping statute (47 U.S.C. 605) itself forbade admission of the evidence, since the disclosure in the courtroom of the intercepted communication, coupled with the earlier interception, was itself another violation of the statute (355 U.S. at 102):

> Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law, *in this case in a federal court*. [Emphasis added.] [20]

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[20] The Court's further statement—that "we do not mean to imply that an out-of-court violation of the statute would not also lead to the invalidation of a subsequent conviction" (355 U.S. at 102, note 9)—does not detract from our contention that *Benanti* is not controlling even by analogy. Under the anti-wiretapping statute any use of intercepted messages constitutes a criminal offense. Therefore, the use of the message, whether in or out of court, would be a violation of the statute. On the other hand, in a situation involving the silver-platter doctrine, the obtaining of the evidence is improper, but not its use. Thus, in the instant case, only the state, not federal, officers could possibly be guilty of violating the Federal Constitution or Oregon law.

2. *The rationale of the silver-platter doctrine.*—The continued adherence of the courts of appeals to the silver-platter doctrine, despite a partial change in its rationale, suggests that the rule has its roots in practical realities which continue although theories may change. Cf. *Hawkins* v. *United States,* 358 U.S. 74, 79; *Weiler* v. *United States,* 323 U.S. 606, 610. We submit that these realities continue to justify the rule now, just as much as before *Wolf* was decided.

a. As this Court has consistently held, the exclusionary rule is not a necessary requirement of the Fourth Amendment. The right of privacy protected by the Fourth Amendment is entitled to protection, but it does not follow that it must be protected by excluding illegally obtained evidence in every situation. Even though the Court decided in *Weeks* that an effective way to enforce the right of privacy against incursion by federal officers was to bar the evidence from a federal trial, it has consistently declined to compel the states to enforce the right in the same manner. In the very decision, *Wolf* v. *Colorado,* 338 U.S. 25, in which this Court held that the right of privacy protected by the Fourth Amendment against actions by federal officers was also protected against state incursion by the Fourteenth Amendment (*id.* at 27–28), it also ruled that state courts were not required to enforce the right of privacy by excluding evidence unlawfully obtained. This holding rested on the Court's conclusion that "[t]he Fourteenth Amendment does not forbid the admission of evidence ob-

tained by an unreasonable search and seizure." *Id.* at 33. The *Weeks* rule of exclusion "was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication." 338 U.S. at 28; see *id.* at 39–40 (Mr. Justice Black concurring). See also *Stefanelli* v. *Minard,* 342 U.S. 117, 122; *Salsburg* v. *Maryland,* 346 U.S. 545, 554.

Consistent with *Weeks* and *Wolf,* the Court in *On Lee* v. *United States,* 343 U.S. 747, 755, held that the *Weeks* exclusionary rule went "beyond the requirements of the constitutional or statutory provision." Further, the Court stated (*ibid.*):

> In so doing, it has, of course, departed from the common law rule under which otherwise admissible evidence was not rendered inadmissible by the fact that it had been illegally obtained. *Such departures from the primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy.* * * * [Emphasis added.]

And Mr. Justice Jackson, in the principal opinion in *Irvine* v. *California,* 347 U.S. 128, again made clear that the exclusionary rule as a federal sanction was not required by the Fourth and Fourteenth Amendments. Therefore, he stated (*id.* at 134–135), the issue:

> Whether to exclude illegally obtained evidence in federal trials is left largely to our discretion, for admissibility of evidence is gov-

erned "by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." [21]

b. The decisions of this Court show that the rule of exclusion, as a rule of practicality, is essentially designed to have a disciplinary purpose. Thus, under *Weeks* the federal courts have undertaken to deter federal officers from violating the Fourth Amendment by preventing them from using the evidence unlawfully obtained. The essentially disciplinary nature of the exclusionary rule was made more clear in *Rea* v. *United States, supra,* 350 U.S. 214, which rejected the contention that "the only difference * * * between the *Wolf* decision and *Weeks* * * * is the difference between state and federal courts." *Id.* at 220 (dissenting opinion). Instead, the Court held that federal courts would so far control federal officers as to prevent them from turning evidence over to a state even though the state would thereby be effectively prevented from prosecuting the defendant for a violation of state law.

Similarly, in considering whether to require exclusion in state courts under the Fourteenth Amendment,

[21] In contrast, in other situations the Fourteenth Amendment, in and of itself, bars the admission of evidence in state courts. See *Spano* v. *New York*, 360 U.S. 315, 324; *Payne* v. *Arkansas*, 356 U.S. 560, 561, and the cases cited therein, holding that the Fourteenth Amendment bars the use in a state criminal trial of a coerced confession. And see *Rochin* v. *California*, 342 U.S. 165, 172, holding that the Fourteenth Amendment forbids the introduction of evidence in state courts obtained by conduct, such as forcible stomach pumping, which "shocks the conscience."

Mr. Justice Frankfurter, in *Wolf* v. *Colorado*, speaking for the Court, recognized that the answer depends upon whether exclusion is necessary to protect the right of privacy guaranteed by the Constitution: "[T]he immediate question is whether the basic right to protection against arbitrary intrusion by the police demands the exclusion of logically relevant evidence obtained by an unreasonable search and seizure * * *". 338 U.S. at 28. He concluded that, since other remedies might be "equally effective" to enforce the requirements of the Due Process Clause against state officers,[22] the rule of exclusion was not required by the Federal Constitution in state courts. *Id.* at 31.

It is this disciplinary character of the exclusionary rule that accounts for, and justifies, the silver-platter doctrine. First, the state officers, and only the state officers, violated the Constitution in any situation in which the doctrine may be invoked. In *Wolf*, the Court pointedly stated that "[t]here are * * * reasons for excluding evidence unreasonably obtained by the federal police which are less compelling in the case of police under state or local authority. The public opinion of a community can far more effectively be exerted against oppressive conduct on the part of police directly responsible to the community itself than can local opinion, sporadically aroused, be brought to bear upon remote authority pervasively exerted throughout the country." *Id.* at 32–33. There-

[22] Oregon, for example, provides both a criminal and a civil remedy for illegal searches. Ore. Rev. Stat., section 141.990; *Smith* v. *McDuffee*, 72 Ore. 276, 142 Pac. 558; *State* v. *Ware*, 79 Ore. 367, 155 Pac. 364.

fore, the Court concluded that, in view of the other remedies available, exclusion of evidence in state courts would not be constitutionally necessary to protect against unreasonable searches and seizures by state officers. Similarly, exclusion of evidence obtained illegally by state officers is not necessary in the federal courts.

Second, the only officers that the federal courts can effectively control are federal officers. If an unlawful search or seizure was not participated in by federal agents, a rule of exclusion in the federal courts would not tend to preserve the right of privacy embodied in the Fourth and Fourteenth Amendments. State officers enforcing state law who conduct an illegal search and seizure would not be deterred from future violations merely because the evidence of a federal crime which they occasionally happened upon was excluded in the federal courts. The effect of such a ruling would be to impede federal prosecution, and, more important, endanger society, without significantly furthering the judicial policy of discouraging future illegal intrusions on individual privacy.[23]

[23] Cf. the concurring opinion of Mr. Justice Jackson, joined in by Mr. Justice Frankfurter, in *Gallegos* v. *Nebraska*, 342 U.S. 55, 70:

"Even if we should assume that Texas officials coerced this confession, they were not acting at the request of Nebraska nor in any sense as her agent. Before we could reverse the conviction we would have to decide a question not heretofore answered in any decision that I recall, namely, whether Nebraska merely by admitting a coerced foreign confession in evidence would deny due process. Insofar as the reason for exclusion is to prevent convictions on coerced confessions, which

While an exclusionary rule applicable to evidence obtained by state officers would have little effect in enforcing the Fourth and Fourteenth Amendments, it could seriously interfere with effective and legal federal law enforcement. Such a rule would give persons over whom the federal executive has no control the power to decide when a federal prosecution could be brought. For example, consider the following situation: state officers searching improperly for stolen property, a state crime, find a counterfeiting apparatus which they seize. The building has been under surveillance by federal officers who have deliberately refrained from entering under a search warrant until all the members of the counterfeiting operation can be identified. If the crucial evidence seized could not be introduced in a federal trial, the state officers, whether deliberately or by inadvertence, would likely have immunized the suspects from federal prosecution. Thus, the considerations which led this Court in *Abbate* v. *United States,* 359 U.S. 187, to hold that a state prosecution could not bar federal prosecution

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are shown by legal experience to be intrinsically unreliable, I should suppose that any defect in its origin would adhere in the confession wherever offered. Insofar, however, as the reason for exclusion is to deter states from attempting coercion in order to bring about convictions, the reason would hardly apply to a case where a state of confession sought no conviction and the state of conviction did not seek the confession. But here there is no need to resolve such difficult questions * * * for I find no coercion * * * even if Nebraska be held to answer for the conduct of every official involved."

The illegal seizure of credible evidence, of course, does not render it unreliable.

apply in this field as well. State officers ought not to be given power to prevent, or, at least, seriously interfere with, federal prosecutions. Cf. *id.* at 195. Since federal courts cannot control state officers, they should not undertake to reject evidence because of any improper actions by state officers. That is the underlying reason for the silver-platter doctrine, and it has validity in the realities of our federal system.

This Court has held that application of the broad restraints of due process requires a balancing of the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests. *E.g.*, *Frank* v. *Maryland,* 359 U.S. 360, 363; *Spano* v. *New York,* 360 U.S. 315. If that is so of a constitutional principle, it is certainly true of a rule of judicial policy, especially since "[a]ny claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped." *Nardone* v. *United States,* 308 U.S. 338, 340; see *On Lee* v. *United States, supra,* 343 U.S. at 755. The balance has been found to favor exclusion from a federal trial of evidence obtained by federal misconduct. The concern of federal courts that law enforcement be conducted with due regard to private rights outweighs the public interest in criminal prosecutions. See *Irvine* v. *California, supra,* 347 U.S. at 136–137. But no proper balancing can result in an exclusionary rule where the judicial sanction of exclusion has no value, or little value, as a deterrent. When the assumed illegal search and seizure would have occurred in any event, no matter what the federal judicial policy may be, later exclu-

sion at a federal trial of the evidence obtained, with its resultant hampering effect on federal law enforcement, is not justified.

The special delicacy of the adjustment to be preserved between federal and state power has been an historic concern of the Court; thus, "[t]his Court with all its shifting membership has repeatedly found occasion to say that whatever inconvenience and embarrassments may be involved, they are the price we pay for our federalism, for having our people amenable to—as well as served by and protected by—two governments." *Knapp* v. *Schweitzer,* 357 U.S. 371, 380. Consistent with this view of the federal system, the states have been allowed a large measure of responsibility in law enforcement by this Court's deliberate refusal to interfere in the state administration of criminal law in the absence of congressional command or state trenching upon the requirements of due process. See, *e.g., Knapp* v. *Schweitzer, supra,* 357 U.S. at 378; *Mills* v. *Louisiana,* 360 U.S. 230; *Stefanelli* v. *Minard, supra,* 342 U.S. at 120; *Irvine* v. *California, supra,* 347 U.S. at 134; *Bartkus* v. *Illinois,* 359 U.S. 121, 124, 126, 138–139; *Abbate* v. *United States, supra,* 359 U.S. at 195. And in *Wolf* v. *Colorado,* the Court gave the states the responsibility to enforce proper investigation by their own officers. We submit that this responsibility should be left to the states, particularly when federal action would have little practical effect in protecting any constitutional right.

c. Petitioners' principal arguments (Pet. Br. 72–74) in favor of an exclusionary principle are that a rule of admissibility in federal courts would promote subter-

fuge and evasion on the part of state and federal officers, and that admission would be a ratification of the illegal state search by the federal courts. If the silver-platter rule is used as a means of evasion in a particular case, that can be dealt with as it occurs. There are no facts in this case to support any such suggestion (see *supra*, pp. 7–8, 47–49). State officers in Oregon and federal officials do cooperate to the extent of exchanging information regarding offenses within the other's jurisdiction, but that fact does not show collusion in misconduct. Is there evasion of federal standards when F.B.I. agents read of a state search in a daily newspaper? Or when a county sheriff discovers evidence of wire-tapping and notifies federal agents as well as the telephone company and the Attorney General of Oregon? If instances of collusion and perjury should occur, the federal courts are not so ineffectual as to be unable to protect the administration of justice in that specific instance without adopting a general and inflexible rule of exclusion. See, *e.g.*, *Mesarosh* v. *United States*, 352 U.S. 1, 14; *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, 124; *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233, 242–243.

The argument that the federal courts somehow ratify illegality when they admit evidence illegally obtained by state officers is also not well founded. The fundamental reason for a trial is the discovery of the truth. The rule of exclusion, however, does not bring out the truth; in its immediate impact on a particular case it suppresses truth. Hence the rule

of exclusion is applied, not so much because to admit the evidence implies ratification, but because federal exclusion effectively serves to keep federal law enforcement within proper bounds. The federal courts do not undertake to make certain that every bit of evidence that comes before them has been obtained with due observation of all the amenities by every person who might have relevant evidence. This was recognized by the Court in *Burdeau* v. *McDowell*, 256 U.S. 465. There, petitioner's employer, after discharging him, stole documents from petitioner's desk and safe and, after using them, turned them over to the government because they tended to show the commission of a federal offense. This Court held that the government need not surrender the documents to petitioner, stating (*id.* at 476):

> The papers having come into the possession of the Government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the Government, may have wrongfully taken them, should prevent them from being held for use in prosecuting an offense where the documents are of an incriminatory character.

Just as admission of the evidence in *Burdeau* did not mean exoneration or approbation of the employer's illegal acts, admission of evidence in the present situation does not exonerate the state officers or imply approbation of their actions. Admission of the evidence in a case involving illegal action by state officers merely means that the public interest in prosecu-

tion outweighs the benefit derived from application of an ineffective sanction. And just as the federal government need not take into account, or justify, the manner in which a private individual obtained evidence bearing on a crime, it ought not to have the burden of undertaking to justify the manner in which a state obtained evidence. The most that the federal courts can do is to make certain that its own officers—federal officers—conduct law enforcement activities within the limitations prescribed by the Constitution and by Congress. And arguments of ratification or condonation are relevant to that inquiry, if at all, only when federal officers are involved. See also *Feldman* v. *United States*, 322 U.S. 487, 492.[24]

Petitioners argue (Pet. Br. 84) that, since Oregon has an exclusionary rule applicable in its own courts, evidence illegally obtained by Oregon state officers should likewise be inadmissible in federal courts. Rule 26 of the Federal Rules of Criminal Procedure, however, contemplates "the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in the Federal Courts" regardless of their locality. Notes of Advisory Committee, Rule 26. Therefore, the federal courts should not differentiate between the minority of states which

[24] Mr. Justice Brandeis' famed dissent in *Olmstead* v. *United States*, 277 U.S. 438, rests in large measure on the proposition that the illegal action was taken by federal officers. *Id.* at 482. In fact, he stated, "The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress." *Id.* at 484. But see *Burdeau* v. *McDowell*, 256 U.S. 465, 476-477 (Justices Brandeis and Holmes dissenting).

have the exclusionary rule and those which do not, particularly so long as the states are free to adopt their own methods of protecting this right of privacy.[25]

In any event, the State of Oregon has never adopted the exclusionary rule. Although Oregon decisions seem to recognize the propriety of *filing* a motion to suppress evidence in connection with a pending criminal case,[26] the question has never been squarely presented for decision in that state. See Note, 35 Ore. L. Rev. 51, 52. As recently as *State* v. *Hoover*, *supra*, 347 P. 2d 69, 73, the Supreme Court of Oregon pointed out that "[t]he federal practice is to deny the use of such [illegally obtained] evidence", and that there was a dictum in an earlier Oregon decision saying

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[25] Petitioners say (Pet. Br. 68–69) that, in a state following the *Weeks* rule, the silver-platter doctrine means that illegally obtained evidence is barred from use in both state and federal courts in every situation except when state officers turn over such evidence to federal officers for use in federal courts. They then suggest that this exception to total exclusion is illogical. But the rules laid down in *Weeks* and *Rea* barring the use of evidence illegally obtained by federal officers in state or federal courts are the product of federal interest in disciplining the federal government's own officers (see *supra*, p. 55). In contrast, this Court has left the method used to discipline state officers to the states themselves. *Wolf* v. *Colorado*, *supra*. Thus, what method a particular state uses to discipline its own officers is not the concern of the federal courts and, conversely, the state's decision in favor of exclusion in its own courts does not logically require a similar result in the federal courts.

[26] See *State* v. *Quartier*, 114 Ore. 657, 661, 236 Pac. 746; *State* v. *McDaniel*, 115 Ore. 187, 192, 231 Pac. 965, affirmed on rehearing, 115 Ore. 234, 235, 237 Pac. 373; *State* v. *Christensen*, 151 Ore. 529, 531, 51 P. 2d 835.

that the same rule ought to be followed in Oregon. Nevertheless, the court continued (*ibid.*):

> [T]here [in the earlier Oregon case], as here, it was not necessary to reach the question. We have never been confronted with a case which has squarely demanded a decision to accept or reject the dictum of the Laundy case.[27]

The state circuit court, in its order of September 17, 1956, must have taken cognizance of the fact that Oregon Revised Statutes (see sections 41.910, it expressly declined to suppress the seized property in connection with the state criminal indictment for wire-tapping (R. 26). And the statement that the Attorney General of Oregon was not to use the wire-taps in any manner without first obtaining a court order specifically refers (R. 26) to provisions of the Oregon Revised Statutes (see sections 41.910, 141.720, and 165.540), which, taken together, provide that intercepted telephone communications shall not be used for any purpose without a prior court order.

Petitioners also suggest (Pet. Br. 69–72) that the history of the state and federal court actions in this case demonstrates that, far from promoting a healthy federalism, the silver-platter doctrine causes "a maximum of interference between state and federal courts, particularly in the many States that follow the Weeks rule." But, as shown above, Oregon cannot be said to be such a state. More important, it was petitioners' own actions—in attempting to inter-

[27] The dictum in *State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958, 975, said that the *Weeks* rule "ought * * * to be adopted."

fere with federal process and the federal courts by enjoining key government witnesses—which caused the apparent conflict. Furthermore, as we show below (pp. 72–85), the state injunction against the witnesses which initiated the alleged conflict was invalid under the Supremacy Clause of the Federal Constitution as it has been interpreted by this Court. Thus, petitioners can hardly claim that it is the silver-platter doctrine which caused the conflict, when the action of the state court is contrary to paramount law.

d. There are some instances of conduct by officers so illegal that this Court has held that admission of the fruits of the conduct in a state court would violate due process under the Fourteenth Amendment. *Rochin* v. *California,* 342 U.S. 165. Of course, as to such conduct, the fruits thereof would also be inadmissible in a federal trial. But neither this case nor *Rios* (No. 52, this Term) presents any such problem. In both cases, the invalidity of the state search is at most a debatable issue. In both, property which was both the instrumentality and the direct fruit of a crime (the instant case) or contraband (*Rios*) came into the hands of the state. Since the federal government had nothing to do with the manner in which the property was obtained by the state, the federal government ought to be able to use the property which the state has in its custody. In short, if a state retains property—and particularly when, as here and in *Rios,* it is validly retained—which constitutes probative evidence of a federal crime, the federal government ought to be able to use it.

C. IF THE "SILVER PLATTER" DOCTRINE IS REJECTED, THIS COURT COULD CONSIDER THE SERIOUSNESS OF THE IMPROPRIETY IN DECIDING WHETHER TO EXCLUDE EVIDENCE ILLEGALLY OBTAINED

As we have contended above, we believe that the silver-platter doctrine is supported not only by numerous judicial precedents, but by the rationale and practical consequences of the exclusionary rule. If, however, these arguments are rejected by this Court, we submit that, since the exclusionary rule is merely a rule of evidence not required by the Fourth Amendment, the Court under is supervisory powers could adopt a flexible rule under which the evidence seized here by the state officers, even if illegally obtained, could be properly admissible.

1. The situation involved here—the admission of evidence obtained by state officers in a federal court—stands logically between the *Weeks* and *Wolf* cases. Unlike in *Weeks*, the evidence was obtained by state not federal officers; unlike in *Wolf*, the evidence was admitted in a federal not a state court. As we have shown above (pp. 57–59), an exclusionary rule would not effectively deter unreasonable searches and seizures where state officers are involved since they are unlikely to be seriously concerned about the outcome of occasional federal prosecutions. For this reason, and the other reasons discussed above which support the silver-platter doctrine as a whole, we believe that, even if the court rejects that doctrine, it should not adopt the flat exclusionary rule which was appropriate and effective in the very different circumstances where the search and seizure were made by federal officers.

Instead of a flat or automatic exclusionary rule, we submit that, assuming the rejection of the silver-platter doctrine, the Court could, if it wished, adopt a standard which would consider the circumstances of the illegal search and seizure. In particular, evidence should not be barred which was obtained by state officers acting in good faith but mistakenly failing to comply with all the legal requirements. Only that evidence would be barred which was obtained by intentional or clear violation of constitutional rights. By this rule the Court could protect the right of privacy to the extent which any rule barring evidence in the federal courts is able to do with regard to the actions of state officers. On the other hand, the rule would interfere as litle as possible with the important interest of the federal government, and the country as a whole, in effective enforcement of federal law by not barring the use of evidence merely because the state officers erred in a comparatively minor way. Such a distinction between the types of violations is particularly appropriate where the effectiveness of the remedy of exclusion is doubtful at best.

This Court has often adopted flexible standards concerning the particular circumstances in deciding constitutional questions (see *supra*, pp. 59–60). Moreover, as we have shown (pp. 53–55), the rule of exclusion even with regard to federal officers is not a constitutional principle, but is rather one of judicial policy. It, therefore, follows that the Court can

adopt a flexible standard which would consider the practical needs of federal law enforcement as well as the necessity of protecting rights guaranteed by the Constitution.

That a flexible rule of exclusion is possible is demonstrated by the recent decisions of the Scottish High Court of Judiciary. Until 1950, that court allowed the admission of evidence even if illegally obtained. In 1949, however, in *Lawrie* v. *Muir*, [1950] Scots L.T.R. 37, the court held illegally seized evidence inadmissible but only under certain conditions. The court recognized the conflicting interest "of the citizen to be protected from illegal or irregular invasions of his liberties by the authorities" and "of the State to secure that evidence bearing upon the commission of crime and necessary to enable justice to be done shall not be withheld from courts of law on any formal or technical ground." *Id.* at 39–40. In order to reconcile these two interests, the court concluded that a simple, absolute rule, while desirable, was not feasible. Therefore, the court decided to look to the circumstances of each case, barring evidence obtained by deliberate illegality on the one hand, but admitting evidence obtained by some lesser violation of the law on the other.

Considering the particular circumstances involved in *Lawrie* v. *Muir*, the High Court held the evidence

inadmissible. Shortly thereafter, in *M'Govern* v. *H. M. Advocate,* [1950] Scots L.T.R. 133, the court followed *Lawrie* v. *Muir,* although it again held the particular evidence inadmissible. But in *Fairley* v. *Wardens of the City of London,* [1951] Scots L.T.R. 54, 58, the High Court allowed the admission of evidence even though it was illegally obtained:

> * * * It follows that the procedure whereby the incriminating evidence was obtained was not strictly in accordance with any statutory or other authority. * * * I can find nothing to suggest that any departure from the strict procedure was deliberately adopted with a view to securing the admission of evidence obtained by an unfair trick * * *. [I]n the present instance the irregularity ought to be "excused" and the evidence admitted.

2. The situation involved here is the kind of case in which the evidence is properly admissible if a flexible standard is to be adopted. The state officers attempted to comply with the law by obtaining a search warrant from a magistrate. Nevertheless, the validity of the affidavit suporting the warrant has been challenged. While we believe that the search and seizure were valid under both state and federal law (*supra,* pp. 31–41), at the very least the action of the state officers was not intentionally or clearly unlawful. Considering the circumstances and the fact that the exclusion of evidence would interfere with federal law enforcement without effecitvely disciplining state officers, we submit that the evidence was

properly admissible under any standard attempting to balance the rights of the individual and the valid interests of society as a whole by excluding some but admitting other evidence.

III

A STATE COURT MAY NOT ENJOIN THE TESTIMONY OF WITNESSES SUBPOENAED TO APPEAR AND TESTIFY AT A FEDERAL CRIMINAL TRIAL

A. THE VALIDITY OF THE STATE COURT INJUNCTION IS IMMATERIAL TO PETITIONERS' APPEAL

The temporary restraining order issued by the Oregon circuit court, pursuant to a civil suit filed by petitioners, was directed to certain named persons and "all other State and County officers or officials having knowledge of this order" and prohibited them from giving testimony at petitioners' federal trial as to the search and seizure involved in this case (see *supra*, pp. 12–13). The federal trial court, however, held that the order was invalid and ordered eight state and local officials, including six specifically named in the state court's order, to testify. The officials obeyed the federal court's order.

It is clear that the state court order ran only to state and local officials. Therefore, when the officials testified in federal court, neither the court nor the prosecution was violating the order. Whether, on the other hand, the officials were violating the order depends upon whether the state court had authority to issue its order in the first place. But even if we assume, *arguendo*, that the state order was valid—and

therefore the federal court should not have ordered the witnesses to testify—this assumption merely means that the witnesses were in contempt. And even if the witnesses were, in fact, in contempt of the state court, this is hardly justification for reversing petitioners' convictions. In other words, whether or not the witnesses were in contempt is immaterial to the outcome of petitioners' appeal.[28]

B. THE STATE COURT INJUNCTION CONSTITUTED AN INVALID ATTEMPT TO INTERFERE WITH FEDERAL PROCESS IN A FEDERAL CRIMINAL CASE.

1. The original state injunction was issued on April 15, 1957, long after the evidence at issue here was in federal custody, and one day before the federal trial began. When the state circuit court judge entered his temporary restraining order he knew that the federal prosecution was at issue. In the very first sentence of his memorandum opinion of April 15, 1957, he noted that petitioners were "now being tried" in the federal court for a federal offense (R.

[28] After the state and local officials had testified at petitioners' trial, petitioners on May 10, 1957, moved in the state circuit court to cite seven of them for contempt (R. 434–438). The United States then brought an action on May 23, 1957, in the federal district court seeking and obtaining a temporary restraining order forbidding petitioners to prosecute their action in the state circuit court (R. 422–448). Petitioners can test the legality of the state court's original order forbidding the state and local officials from testifying, and the effect of their disobedience, either by appealing from the federal district court's ultimate determination in the suit brought by the United States on May 23, 1957, or by defending the action brought by District Attorney Langley in the state circuit court to vacate its original temporary restraining order forbidding him from testifying (see *supra*, p. 29).

295). Moreover, the state judge stated that "[t]he case against [petitioners] in the Federal District Court will be made by testimony of State officers * * *" (R. 296). Therefore, although the state judge expressed the view that his temporary restraining order would not interfere with the federal court (R. 300), he knew that the order, if given effect, would largely subvert the federal subpoena process in petitioners' case.

There is a sophism inherent in the statement made by the state court which issued the restraining order that the order did not really interfere with federal process because it left the state officers free to testify about everything except matters relevant to the federal prosecution—a contention repeated by petitioners (Pet. Br. 86). The argument seeks to justify emasculation of the federal process by pointing to the preservation of its shell. The state court had no authority whatsoever to attempt to limit the areas of testimony compellable from witnesses served with federal subpoenas.

Of the six witnesses named in the state temporary restraining order to whose testimony petitioners objected, five had been subpoenaed, on application of the government, to appear and testify at the federal trial before the state court's restraining order was filed (R. 415–416, 418–419, 421–423). Only one, Oscar Howlett (who testified for petitioners in connection with their motion to suppress), was served with the government's subpoena after the temporary restraining order naming him was entered, and he

was never served with the order extending the temporary restraining order beyond April 18, 1957, although he knew of the extension (R. 374–376, 416–417). The two other witnesses to whom petitioners objected at their trial were not specifically named in the order, and were not shown to be bound by it.[29]

In any event, even if the injunction had issued before the federal subpoenas and had been directed against all eight witnesses, still it seriously interfered with federal powers and a federal prosecution. Petitioners and the state circuit court knew that these eight witnesses would be relied on in large measure to prove the government's case. A state court cannot be allowed to cripple a federal prosecution merely by acting before the federal subpoenas are served.[30]

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[29] One witness, Howard Lonergan, was expressly exempted from the terms of the restraining order, and defense counsel at trial conceded that Lonergan was correct in stating that he was not bound by the order (see *supra* p. 13, fn. 7). Another, James Darby, was not specifically named in the temporary restraining order; if it purported to apply to him, it could only be on the basis that he came within the category set forth in the restraining order of "all other State and County officers or officials having knowledge of this order" (R. 303). Petitioners failed to establish that Darby knew of the restraining order before he was served with federal process in this case, although Darby knew of the order when he took the witness stand at the trial (R. 395). Lonergan and Darby were served with the federal subpoenas on April 29 and May 1, respectively (R. 417–418, 419–420).

[30] Petitioners contend (Pet. Br. 76, 78) that the validity of the injunction should not depend on whether it preceded or followed issuance of the subpoenas. We agree insofar as we believe that the state injunction would have been invalid even if it had preceded all the subpoenas. However, it is even more clear an interference with federal process because it came after most of the subpoenas.

The conflict between state and federal courts in this case did not result from the course of variant proceedings in the two courts. Petitioners specifically invoked the equitable powers of the state court, thereby deliberately inducing the conflict for the sole purpose of attempting to impede the federal criminal prosecution. Thus, there is no basis for the suggestion (Pet. Br. 76–78) that the district court or the government invited a "race of diligence" or promoted any unseemly jostling between a federal and a state court.[31] Rather, the facts inescapably show that the state court, through an equitable action, attempted to interfere with federal process in a federal criminal trial. This it cannot do.

2. This Court decided early that state courts may not interfere with the process of a federal court, even by the issuance of an extraordinary writ. In *Ableman* v. *Booth*, 21 How. 506—referred to in *Ponzi* v. *Fessenden*, 258 U.S. 254, 261, as "the great judgment"—the respondent was charged with a federal offense and, after a hearing by the United States commissioner, was held to answer at the next term of federal district court. The commissioner committed respondent to the custody of the United States marshal, until discharged by due process of federal

[31] It is hard to take seriously petitioners' statement that they were "rushed to trial" (Pet. Br. 77). The case was first set for trial on March 26, 1957, seven weeks after the indictment was returned. Petitioners obtained a continuance which delayed the trial until April 16, 1957. Of more significance is the fact that petitioners did not file their federal motion to suppress until March 25, 1957, forty-nine days after indictment (R. 13; see Pet. Br. 77).

law. Booth obtained an order by writ of *habeas corpus* in the Wisconsin courts that the federal marshal discharge him. This Court reversed, placing its decision squarely upon the Supremacy Clause of the Constitution.[32] It noted that the state was sovereign within its territorial limits, but that Wisconsin's sovereignty was limited by the Federal Constitution, and that "the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." 21 How. at 516. The supremacy of the federal government in its proper spheres of action meant that its judicial processes must be (*id.* at 517–518):

> equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States [to pass on federal supremacy], conflicting decisions would unavoidably take place, * * *. It was essential, therefore, to its very existence as a Government, that it [the federal government] should have the power of establishing courts of justice, altogether independent of State power, to carry

[32] In *United States* v. *Booth*, which was argued and decided with *Ableman* v. *Booth*, the same respondent had been indicted by a federal grand jury for the same offense with which he was charged before the commissioner. After trial, he was found guilty and sentenced to imprisonment and to pay a fine. The Supreme Court of Wisconsin again issued a writ of *habeas corpus*, concluded that the imprisonment pursuant to sentence was illegal, and ordered that Booth be discharged. In that case, the state court had gone a step farther and purported to exercise jurisdiction over a federal court's judgment.

> into effect its own laws; and that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a State court or a court of the United States, should be finally and conclusively decided. * * *
>
> Accordingly, it [the paramount judicial authority] was conferred on the General Government, in clear, precise, and comprehensive terms [by the framers of the Constitution]. * * *.

Turning to the facts of the case before it, this Court agreed that a state court may issue process to determine upon what authority a person is imprisoned within the territorial limits of its state, but that once it is made known to the state court that the person is held under the authority of the United States, the state court can proceed no further. "[N]either the writ of *habeas corpus,* nor any other process issued under State authority, can pass over the line of division between the two sovereignties." 21 How. at 523. It was the clear duty of the federal marshal "to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other Government." *Id.* at 523–524.[33]

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[33] The decision in *Ableman* v. *Booth*, *supra*, was foreshadowed to a certain extent by a circuit court decision three years earlier in *Ex parte Robinson*, 6 McLean 355, Fed. Cas. No. 11,935. In that case, a federal commissioner issued a warrant for the arrest of a fugitive from labor who earlier had been adjudged to be a free person by an Ohio state court. The marshal to whom the federal warrant was issued arrested the fugitive and produced her for a federal hearing on the claim. While the hearing was adjourned pending determination, an

If, after the decision in *Ableman* v. *Booth,* there was any doubt as to the paramount right of federal courts and federal officers to be free from interference by state courts, that doubt could not have survived the decision in *Tarble's Case,* 13 Wall. 397. In the latter case, a state court commissioner issued a writ of *habeas corpus* to a recruiting officer of the United States to bring before the commissioner a person who had enlisted as a soldier in the army and whose discharge was sought on the ground that his enlistment was illegal. This Court held that the state judge had no jurisdiction to continue proceedings under a writ of *habeas corpus* after it was shown that the person whose discharge was sought was held by a federal officer under the authority, or the claim or color of authority, of the United States (*id.* at 407):

Ohio state court issued a writ of *habeas corpus* directing the federal marshal to bring his prisoner into the state court. The marshal refused to do so and was himself imprisoned by a county sheriff. The marshal sought *habeas corpus* in the federal court on the ground that he was illegally imprisoned by Ohio. Mr. Justice McLean, acting as circuit justice, discharged the marshal from state custody, saying that the state court had no power to interfere with the federal commissioner's hearing, even if it was assumed that the prior state adjudication that the fugitive was free was final, and that the federal arrest warrant for the fugitive was defective. *Id.* at 360–361. He noted that another court of the federal system could not have taken the action which the state court took, and that "a court of a different government could interpose in this form, is sanctioned by no law or precedent." *Id.* at 361–362. "That the Commissioner had jurisdiction in the case is clear. * * * It [the state court] wrested from him, without any authority of law, the subject of his jurisdiction. This, so far as I know, is without precedent." *Id.* at 365.

> Whenever * * * any conflict arises between the enactments of the two sovereignties [state and federal], or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. * * *
>
> Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. * * *

The right of federal courts and federal process to be free of interference by state judicial, legislative, or executive officers has received continuing recognition to the present day. State legislatures and state governors cannot nullify federal court orders, even by indirect interference. *Cooper* v. *Aaron,* 358 U.S. 1, 8–11, 18–19; *Sterling* v. *Constantin,* 287 U.S. 378, 397–398. State courts cannot refuse to give effect to an otherwise valid federal statute, simply because the statute affects their rules of court practice. *Adams* v. *Maryland,* 347 U.S. 179, 193; *Brown* v. *Walker,* 161 U.S. 591, 606–608. Yet the converse is not true, since it is for Congress and the federal courts to say what testimonial and real evidence is to be admitted in a federal criminal trial, not the state courts. Rule 26, F.R. Crim. P.; see *Funk* v.

United States, 290 U.S. 371; *Wolfle* v. *United States,* 291 U.S. 7, 12–13; *McNabb* v. *United States,* 318 U.S. 332, 341; *Lutwak* v. *United States,* 344 U.S. 604, 613–614. State courts may not refuse to provide a forum for the enforcement of a federal statutory right because the state court regards the federal statute as penal and has a policy of refusing to enforce penal laws enacted by legislatures other than its own. *Testa* v. *Katt,* 330 U.S. 386, 392–393; see *Claflin* v. *Houseman,* 93 U.S. 130, 137. With specific reference to the subpoena power of a federal court, no state court can legally thwart a federal subpoena calling for production of, or access to, state voting records. *In re Wallace,* 170 F. Supp. 63, 69–70 (M.D. Ala.). And, if driven to exercise the extreme of judicial power, it is the federal court which has the statutory authority to stay proceedings in a state court to protect its own jurisdiction, not the reverse. 28 U.S.C. 1651, 2283.[34]

3. The doctrine of comity concerns itself with "[t]he forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other * * *." *Ponzi* v. *Fessenden, supra,* 258 U.S. at 260, quoting

[34] The latter statute, like its predecessors, has received a relatively narrow construction so as to minimize federal court interference with state courts. See *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118; *Amalgamated Clothing Workers of America* v. *Richman Brothers Co.*, 348 U.S. 511. But the power of Congress to enact, and the power of federal courts to enforce, legislation permitting interference with state courts has not been successfully challenged.

from *Covell* v. *Heyman*, 111 U.S. 176. Had the doctrine of comity been allowed full play in this case, the state court would have refused to restrain state officers whose testimony was relevant to the federal prosecution without ever reaching the question of its lack of power. It was the state court which interfered with federal process, not the reverse. In short, comity as a doctrine dictating that federal and state courts must show due regard for each other's processes, insofar as it is compatible with federal supremacy to do so, furnishes another separate reason for concluding that the state court erred in attempting to restrain the testimony of state officials subject to federal subpoena.

Nothing said by this Court in *Ponzi* v. *Fessenden* respecting comity does violence to the principles of federal supremacy discussed above. In that case petitioner was sentenced to imprisonment by a federal court for violations of federal law. While serving his federal sentence and with the consent of the Attorney General, petitioner was taken on a state writ of *habeas corpus* into a state court and put to trial on state indictments. This Court held the federal system could permit this procedure as a matter of comity, but it also recognized that "[u]ntil the end of his [petitioner's federal] term and his discharge, no state court could assume control of his body without the consent of the United States." 258 U.S. at 261. In short, *Ponzi* was not concerned with whether the United States had the power to exercise exclusive jurisdiction over petitioner. That much was clear. Rather, the question was whether the United States, as a matter of comity,

could decline to insist upon the exclusiveness of its jurisdiction. The answer that the federal government could relinquish its exclusive jurisdiction has no application in this case. Here, the federal district court at all times insisted upon its exclusive right to determine the issues of the federal case.

4. Petitioners' almost complete reliance on *Rea* v. *United States*, 350 U.S. 214 (Pet. Br. 75, 78, 81–83, 86, 90), depends upon their assertion that the rule announced in *Rea* is "not one of supremacy but of comity" (Pet. Br. 84). Therefore, they argue, *Rea* applies to this converse situation where the evidence obtained illegally by state officer is to be introduced in a federal court.[35] We submit that this interpretation of the Court's holding is erroneous.

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[35] Moreover, despite petitioners' claim (Pet. Br. 81–83), the action of the state circuit court in attempting to enjoin the state and county officers from testifying at the petitioner's trial does not present the converse factual situation of that involved in *Rea*. Here, the federal prosecution was initiated, not by the offending local officers, but by federal officers; in *Rea*, the state prosecution was initiated on a complaint sworn to by the federal agent who had made the unlawful search and seizure which resulted in the federal court's order suppressing the evidence. Here, the state court attempted to enjoin testimony by state officers most of whom at the time were under federal subpoenas to appear in the federal prosecution; in *Rea*, it was not shown that the federal officer had been served with a state subpoena (see the Government's Brief, No. 30, O.T. 1955, p. 4). Here, the evidence was in the hands of federal officers pursuant to federal process and the federal trial was scheduled to begin the day after the restraining order was issued; in *Rea*, one of the avowed purposes of the complaint for injunction was to prevent physical transfer of the property and the state prosecution was not shown to be imminent (*ibid.*).

In *Rea* v. *United States* this Court, exercising its "supervisory powers over federal law enforcement agencies" (350 U.S. at 217), concluded that a federal injunction should issue to prevent a federal agent from delivering physical custody of illegally seized contraband to a state court, and to prevent the federal agent from testifying about the illegal search in that court. The basis of the Court's decision was (*ibid.*):

> To enjoin the federal agent from testifying is merely to enforce the federal Rules against those owing obedience to them.
>
> * * * Federal courts sit to enforce federal law; and federal law extends to the process issuing from those courts. The obligation of the federal agent is to obey the Rules. * * *

There is not a single word in the decision even suggesting that it was based on the principle of comity. Nor is this surprising since the Court in effect refused to follow the rule of comity—that is, "[t]he forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, * * * by avoiding interference with the process of each other * * *." *Ponzi* v. *Fessenden, supra,* 258 U.S. at 260. The Court declined such forbearance because of the importance of protecting the right of privacy from illegal search and seizure by federal officers.

While the opinion in *Rea* does not mention the Supremacy Clause—which is not unusual for decisions that depend ultimately upon it—almost certainly

this Clause underlies the decision.[36] At the least, there is no suggestion in the opinion that its rule is an avenue designed for two-way traffic. And all the other decisions of this Court regarding the supremacy of federal judicial process (see *supra*, pp. 75–80) refute any contention that state courts may rely upon *Rea* for the proposition that state courts may, by injunction, interfere with federal process in order to try a collateral issue of evidence. We enjoy "a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other * * *." *Brown* v. *Allen*, 344 U.S. 443, 498 (Mr. Justice Frankfurter concurring). This case involves such a limitation, for it is the state court which is subject to federal limitations enforceable in a federal court, not the reverse.[37]

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[36] In fact, the quotation from *Rea* on pages 82–83 of petitioners' brief supports our view that the decision depends upon the Supremacy Clause and does not apply to evidence to be introduced in a federal court. Petitioners, by substituting "state" for "federal" and vice versa, have made the quotation inconsistent with the tenor of this Court's decisions establishing the supremacy of federal process.

[37] Moreover, the injunction issued by the state circuit court seems improper even under Oregon law. The decisions of the Oregon Supreme Court demonstrate that an injunction will issue to "stay the hands of the peace officers in enforcing criminal law * * *" (*American Federation of Labor* v. *Bain*, 165 Ore. 183, 216, 106 P. 2d 544, 558), only when the penal statute upon which the prosecution is founded is unconstitutional. Thus, every Oregon case which we have examined, including the most recent, has expressly required that the constitutionality of the statute or ordinance be placed in question before the court will consider a suit in equity to enjoin the criminal prosecution. See *American Federation of Labor* v. *Bain*, *supra*; *Sandys* v. *Williams*, 46 Ore. 327, 337, 80 Pac. 642; *Hall* v. *Dunn*, 52 Ore.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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475, 481, 97 Pac. 811; *Portland Fish Co.* v. *Benson*, 56 Ore. 147, 155, 108 Pac. 122; *Sherod* v. *Aitchison*, 71 Ore. 446, 142 Pac. 351; *Spaulding* v. *McNary*, 64 Ore. 491, 497, 130 Pac. 391, 130 Pac. 1128; *Ideal Tea Co.* v. *Salem*, 77 Ore. 182, 185, 150 Pac. 852; *Nault* v. *Palmer*, 96 Ore. 538, 546; 190 Pac. 346; *Aluminum Cooking Utensil Co.* v. *City of North Bend, et al.*, 210 Ore. 442, 423, 311 P. 2d 464.

We have found no instance of the use of an equitable civil action to try collateral criminal issues such as are involved here. While the injunction here does not in terms enjoin the federal prosecution, this is its effect under the circumstances. Therefore, it would appear that the injunction would have been invalid even if issued by an Oregon court to bar testimony in another of Oregon's own courts, let alone in the courts of another, superior sovereign.

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